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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 618

THE UNITED STATES OF AMERICA, APPELLANT

vs.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

FILED DECEMBER 12, 1940

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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1 In United States District Court, Eastern District of Louisiana, New Orleans Division

No. 20067 (Criminal)

UNITED STATES OF AMERICA

vs.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, J. J. FLEDDERMANN

2 *Indictment*

Filed September 25, 1940

UNITED STATES OF AMERICA,
Eastern District of Louisiana, New Orleans Division:

In the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division, at the May term thereof, A. D. 1940.

The Grand Jurors of the United States duly empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oaths present and charge:

That Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann, hereinafter called defendants, together with divers and sundry other persons to your Grand Jurors unknown, heretofore, to wit, on or about September 1, 1940, and continuously thereafter up to and including September 11, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly, and feloniously conspire, confederate, and agree among themselves and with each other and with divers other persons to this Grand Jury unknown, to injure, oppress, threaten, and intimidate citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States; that is to say:

That an election for the office of Congressman in the Congress of the United States of America will be held in the Second Congressional District of the State of Louisiana in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana on November 5, 1940;

That in accordance with the provisions of Louisiana Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, a Democratic Primary election was held on September 10, 1940, in the said Second Congressional District of Lou-

isiana for the purpose of selecting and nominating a candidate for the Democratic party to run in said election of November 5, 1940; that in the said Second Congressional District of Louisiana nomination as the candidate of the Democratic party is and has always been equivalent and tantamount to election, and that, without exception, since the adoption of the first primary election
3 law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected;

That the defendants were selected as Commissioners of Election in accordance with the provisions of said Act No. 46 of 1940, to conduct and did conduct the said Democratic primary election in the second precinct of the eleventh ward of the City of New Orleans, which is in said Second Congressional District of Louisiana and in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court;

That in said Democratic primary election for Congressman from the Second Congressional District of Louisiana there were three candidates possessing the qualifications required by law, to wit, T. Hale Boggs, Paul H. Maloney, and Jacob Young; that the defendants were supporters of T. Hale Boggs for Congress, and of other candidates who were running for other district and local offices, and were affiliated with a certain faction known as the Jones-Noe-Old Regular Faction, which supported T. Hale Boggs for Congress;

That in said primary election on September 10, 1940, five hundred thirty-seven (537) citizens and qualified voters, who were legally registered as Democrats and entitled to vote, appeared at the election polling booth in said second precinct of the eleventh ward of New Orleans for the purpose of casting and did cast their votes in said election;

That it was part of said conspiracy and the purpose of said conspiracy to injure, oppress, threaten, and intimidate the said citizens and registered voters who cast their ballots in said second precinct of the eleventh ward of New Orleans in said Democratic primary election in the free exercise and enjoyment of their rights and privileges secured to them by the Constitution and laws of the United States, to wit, their rights and privileges to vote and to have their votes counted as cast for the candidate of their choice in said election;

That it was also a part of said conspiracy and the purpose of said conspiracy to injure, oppress, threaten and intimidate Paul H. Maloney and Jacob Young, citizens and candidates for the office of Congressman in the Congress of the United States
4 from the Second Congressional District of Louisiana in the free exercise and enjoyment of the rights and privileges

secured to them by the Constitution and laws of the United States, to wit, their right and privilege as citizens to run for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana, by preventing each of them from being legally and properly nominated as a candidate for said office; and, to wit, their right and privilege to have counted for them as cast, all of the votes cast for them in said Democratic primary election;

That it was further a part of said conspiracy and the purpose of said conspiracy to deprive Paul H. Maloney and Jacob Young of the votes cast for them in said second precinct of the eleventh ward by not counting some of the votes cast for them and by erasing the marks on the ballots placed by the voters in said precinct behind the names of Paul H. Maloney and Jacob Young indicating votes for Paul H. Maloney and Jacob Young, and placing in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge that, after the formation of said unlawful conspiracy, and in furtherance thereof, and to effect the object thereof, the said conspirators did commit and do certain overt acts, now herein specified, to wit:

OVERT ACTS

1. That on or about September 10, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court, the said defendants changed eighty-three (83) ballots that had been cast for Paul H. Maloney and marked and counted them as votes for T. Hale Boggs.

2. That on or about September 10, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court, the said defendants changed fourteen (14) ballots that had been cast for Jacob Young and marked and counted them as votes for T. Hale Boggs.

3. That on or about September 10, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court, the said
5 defendants certified in writing to the Chairman of the Second Congressional District Committee of Louisiana that the vote for the office of Congressman from the Second Congressional District of Louisiana was as follows, to wit:

For T. Hale Boggs	526
For Paul H. Maloney	8
For Jacob Young	3

when in truth and in fact the correct vote cast was:

For T. Hale Boggs	426
For Paul H. Maloney	94
For Jacob Young	17

all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT TWO

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: That on or about September 10, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court, one Patrick B. Classic, one John A. Morris, one Bernard W. Yeager, Jr., one William Schumacher, and one J. J. Fleddermann, hereinafter called defendants, who were then and there election officers of the State of Louisiana, to wit, Commissioners of Election in the second precinct of the eleventh ward, New Orleans, selected and acting in accordance with the provisions of Act No. 46 of the Legislature of Louisiana for the year 1940 and acting under color of a law and statute of the State of Louisiana, to wit, the said Act No. 46 of the Legislature of the State of Louisiana for the year 1940 creating the office of Commissioner of Election and defining the duties thereof, did unlawfully, wilfully, knowingly, and feloniously subject and cause to be subjected registered voters of the second precinct of the eleventh ward of New Orleans, inhabitants of the State of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, to wit, their right to cast their votes for the candidate of their choice and to have their votes counted for such candidate as cast in the Democratic primary election of September 10, 1940; that is to say;

6 That an election for the office of Congressman in the Congress of the United States of America will be held in the Second Congressional District of the State of Louisiana in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana on November 5, 1940;

That in accordance with the provisions of Louisiana Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, a Democratic Primary election was held on September 10, 1940 in the said Second Congressional District of Louisiana for the purpose of electing and nominating a candidate for the Democratic party to run in said election of November 5, 1940; that in said Second Congressional District of Louisiana nomination as the candidate of the Democratic party is and has always been equivalent and tantamount to election, and that, with-

out exception, since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected;

That the defendants were selected as Commissioners of Election in accordance with the provisions of said Act No. 46 of 1940, to conduct and did conduct the said Democratic primary election in the second precinct of the eleventh ward of the City of New Orleans, which is in said Second Congressional District of Louisiana and in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court;

That in said Democratic primary election for Congressman from the Second Congressional District of Louisiana there were three candidates possessing the qualifications required by law, to wit, T. Hale Boggs, Paul H. Maloney, and Jacob Young; that the defendants were supporters of T. Hale Boggs for Congress, and of other candidates who were running for other district and local offices, and were affiliated with a certain faction known as the Jones-Noe-Old Regular Faction, which supported T. Hale Boggs for Congress;

That in said primary election on September 10, 1940, five hundred thirty-seven (537) citizens and qualified voters, who were legally registered as Democrats and entitled to vote, appeared at the election polling booth in said second precinct of the eleventh ward of New Orleans for the purpose of casting and did cast their votes in said election;

7 That the defendants, well knowing the premises aforesaid, did on the date aforesaid and at the place aforesaid, wilfully fail and refuse to count some of the votes cast in said election for Paul H. Maloney and for Jacob Young and did erase the marks on various ballots placed by said voters in said precinct behind the names of Paul H. Maloney and Jacob Young indicating votes for Paul H. Maloney and Jacob Young, and did place in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs, and did wilfully fail and refuse to count votes cast for Paul H. Maloney and Jacob Young;

That the defendants certified in writing to the Chairman of the Second Congressional District Committee of Louisiana that the vote for the office of Congressman from the Second Congressional District of Louisiana was as follows, to wit:

For T. Hale Boggs	526
For Paul H. Maloney	8
For Jacob Young	3

when in truth and in fact the correct vote cast was:

For T. Hale Boggs	426
For Paul H. Maloney	94
For Jacob Young	17

all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

8 COUNT THREE

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: That on or about September 10, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this Court, one Patrick B. Classic, one John A. Morris, one Bernard W. Yeager, Jr., one William Schumacher, and one J. J. Fleddermann, hereinafter called defendants, who were then and there election officers of the State of Louisiana, to wit, Commissioners of Election in the second precinct of the eleventh ward, New Orleans, selected and acting in accordance with the provisions of Act No. 46 of the Legislature of Louisiana for the year 1940, and acting under color of a law and statute of the State of Louisiana, to wit, the said Act No. 46 of the Legislature of the State of Louisiana for the year 1940, creating the office of Commissioner of Election and defining the duties thereof, did unlawfully, wilfully, knowingly, and feloniously subject and cause to be subjected one Paul H. Maloney, an inhabitant of the State of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, to wit, his rights, privileges, and immunities (1) to offer himself as a candidate for the office of Congressman in the Congress of the United States for the Second Congressional District of Louisiana; (2) to be legally and properly nominated as a candidate for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana; and (3) to have counted for him all votes legally cast for him for said nomination for said office; that is to say,

That an election for the office of Congressman in the Congress of the United States of America will be held in the Second Congressional District of the State of Louisiana in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana on November 5, 1940;

That in accordance with the provisions of Louisiana Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, a Democratic Primary election was held on September 10, 1940, in the said Second Congressional District of Louisiana for the purpose of electing and nominating a candidate for the Democratic party to run in said election of Novem-

9 ber 5, 1940; that in said Second Congressional District of Louisiana nomination as the candidate of the Democratic party is and has always been equivalent and tantamount to elec-

tion, and that, without exception, since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected;

That the defendants were selected as Commissioners of Election in accordance with the provisions of said Act No. 46 of 1940, to conduct and did conduct the said Democratic primary election in the second precinct of the eleventh ward of the City of New Orleans, which is in said Second Congressional District of Louisiana and in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court;

That in said Democratic primary election for Congressman from the Second Congressional District of Louisiana there were three candidates possessing the qualifications required by law, to wit, T. Hale Boggs, Paul H. Maloney, and Jacob Young; that the defendants were supporters of T. Hale Boggs for Congress, and of other candidates who were running for other district and local offices, and were affiliated with a certain faction known as the Jones-Noe-Old Regular Faction, which supported T. Hale Boggs for Congress;

That in said primary election on September 10, 1940, five hundred thirty-seven (537) citizens and qualified voters, who were legally registered as Democrats and entitled to vote, appeared at the election polling booth in said second precinct of the eleventh ward of New Orleans for the purpose of casting and did cast their votes in said election;

That the defendants, well knowing the premises aforesaid, did on the date aforesaid and at the place aforesaid, wilfully fail and refuse to count some of the votes cast in said election for Paul H. Maloney and did erase the marks on various ballots placed by said voters in said precinct behind the name of Paul H. Maloney indicating votes for Paul H. Maloney, and did place in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs, and did wilfully fail and refuse to count votes cast for Paul H. Maloney;

That the defendants certified in writing to the Chairman of the Second Congressional District Committee of Louisiana that the vote for the office of Congressman from the Second Congressional District of Louisiana was as follows, to wit:

For T. Hale Boggs	526
For Paul H. Maloney	8
For Jacob Young	3

when in truth and in fact the correct vote cast was:

For T. Hale Boggs	426
For Paul H. Maloney	94
For Jacob Young	17

all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT FOUR

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: That on or about September 10, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this Court, one Patrick B. Classic, one John A. Morris, one Bernard W. Yeager, Jr., one William Schumacher, and one J. J. Fleddermann, hereinafter called defendants, who were then and there election officers of the State of Louisiana, to wit, Commissioners of Election in the second precinct of the eleventh ward, New Orleans, selected and acting in accordance with the provisions of Act No. 46 of the Legislature of Louisiana for the year 1940, and acting under color of a law and statute of the State of Louisiana, to wit, the said Act No. 46 of the Legislature of the State of Louisiana for the year 1940, creating the office of Commissioner of Election and defining the duties thereof, did unlawfully, wilfully, knowingly, and feloniously subject and cause to be subjected one Jacob Young, an inhabitant of the State of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, to wit, his rights, privileges, and immunities (1) to offer himself as a candidate for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana; (2) to be legally and properly nominated as a candidate for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana; and (3) to have counted for him all votes legally cast for him for said nomination for said office; that is to say:

11 That an election for the office of Congressman in the Congress of the United States of America will be held in the Second Congressional District of the State of Louisiana in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana on November 5, 1940.

That in accordance with the provisions of Louisiana Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, a Democratic Primary election was held on September 10, 1940, in the said Second Congressional District of Louisiana for the purpose of electing and nominating a candidate for the Democratic party to run in said election of November 5, 1940; that in said Second Congressional District of Louisiana nomination as the candidate for the Democratic party is and has always been equivalent and tantamount to election, and that, with-

out exception, since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected;

That the defendants were selected as Commissioners of Election in accordance with the provisions of said Act No. 46 of 1940, to conduct and did conduct the said Democratic primary election in the second precinct of the eleventh ward of the City of New Orleans, which is in said Second Congressional District of Louisiana and in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court;

That in said Democratic primary election for Congressman from the Second Congressional District of Louisiana there were three candidates possessing the qualifications required by law, to wit, T. Hale Boggs, Paul H. Maloney, and Jacob Young; that the defendants were supporters of T. Hale Boggs for Congress, and of other candidates who were running for other district and local offices, and were affiliated with a certain faction known as the Jones-Noe-Old Regular Faction, which supported T. Hale Boggs for Congress;

That in said primary election on September 10, 1940, five hundred thirty-seven (537) citizens and qualified voters, who were legally registered as Democrats and entitled to vote, appeared at the election polling booth in said second precinct of the eleventh ward of New Orleans for the purpose of casting and did cast their votes in said election;

12 That the defendants, well knowing the premises aforesaid, did on the date aforesaid and at the place aforesaid, wilfully fail and refuse to count some of the votes cast in said election for Jacob Young and did erase the marks on various ballots placed by said voters in said precinct behind the name of Jacob Young indicating votes for Jacob Young, and did place in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs, and did wilfully fail and refuse to count votes cast for Jacob Young;

That the defendants certified in writing to the Chairman of the Second Congressional District Committee of Louisiana that the vote for the office of Congressman from the Second Congressional District of Louisiana was as follows, to wit:

For T. Hale Boggs	326
For Paul H. Maloney	8
For Jacob Young	3

when in truth and in fact the correct vote cast was:

For T. Hale Boggs	426
For Paul H. Maloney	94
For Jacob Young	17

all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT FIVE

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: That one Patrick B. Classic, one John A. Morris, one Bernard W. Yeager, Jr., one William Schumacher, and one J. J. Fleddermann, hereinafter called the defendants, together with divers and sundry other persons to your Grand Jurors unknown, heretofore, to wit, on or about September 10, 1940, and continuously up to and including September 11, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly, and fraudulently devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and claims, from Paul H. Maloney, from Jacob Young, from the legally and qualified registered
13 voters of election precinct two, ward eleven, of the City of New Orleans, from the Democratic party of the Second Congressional District of Louisiana, from the citizens of the Second Congressional District of Louisiana, from the State of Louisiana and the Secretary of State of Louisiana, and from the United States of America and the Congress of the United States, and divers other persons to your Grand Jurors unknown, which said scheme and artifice to defraud was to be effected by the use and misuse of the Post Office establishment of the United States, and in furtherance of and for the purpose of executing said scheme and artifice, did deposit and cause to be deposited in an authorized depository for mail matter to be sent and delivered by the Post Office establishment of the United States, and did cause to be delivered by mail, according to the direction thereon, divers and sundry letters, packages, and writings, which said scheme and artifice to defraud was in substance as follows:

That an election for the office of Congressman in the Congress of the United States of America will be held in the Second Congressional District of the State of Louisiana in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana on November 5, 1940;

That in accordance with the provisions of Louisiana Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, a Democratic Primary election was held on September 10, 1940, in the said Second Congressional District of Louisiana for the purpose of selecting and nominating a candidate for the Democratic party to run in said election of November 5, 1940; that in the said Second Congressional District of Louisiana

nomination as the candidate of the Democratic party is and has always been equivalent and tantamount to election, and that, without exception, since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected;

That the defendants were selected as Commissioners of Election in accordance with the provisions of said Act No. 46 of 1940, to conduct and did conduct the said Democratic primary election in the second precinct of the eleventh ward of the City of New Orleans, which is in said Second Congressional District of Louisiana and in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court;

14

That in said Democratic primary election for Congressman from the Second Congressional District of Louisiana there were three candidates possessing the qualifications required by law, to wit, T. Hale Boggs, Paul H. Maloney, and Jacob Young; that the defendants were supporters of T. Hale Boggs for Congress, and of other candidates who were running for other district and local offices, and were affiliated with a certain faction known as the Jones-Noe-Old Regular Faction, which supported T. Hale Boggs for Congress;

That in said primary election on September 10, 1940, five hundred thirty-seven (537) citizens and qualified voters, who were legally registered as Democrats and entitled to vote, appeared at the election polling booth in said second precinct of the eleventh ward of New Orleans for the purpose of casting and did cast their votes in said election;

That the defendants, well knowing the premises aforesaid, did on the date aforesaid and at the place aforesaid, wilfully fail and refuse to count some of the votes cast in said election for Paul H. Maloney and for Jacob Young and did erase the marks on various ballots placed by said voters in said precinct behind the names of Paul H. Maloney and Jacob Young indicating votes for Paul H. Maloney and Jacob Young, and did place in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs, and did wilfully fail and refuse to count votes cast for Paul H. Maloney and Jacob Young;

That the defendants certified and represented in writing to the Chairman of the Second Congressional District Committee of Louisiana that the vote for the office of Congressman from the Second Congressional District of Louisiana was as follows, to wit:

For T. Hale Boggs	526
For Paul H. Maloney	8
For Jacob Young	3

when in truth and in fact the correct vote cast was—

15

For T. Hale Boggs	426
For Paul H. Maloney	94
For Jacob Young	17

That it was a part of said scheme and artifice to defraud that the defendants would fail and refuse to count votes legally cast for Paul H. Maloney and Jacob Young in order to deprive them of the nomination for the office of Congressman in the Congress of the United States of America from the Second Congressional District of Louisiana, and would instead count votes which had been cast for Paul H. Maloney and Jacob Young for their own candidate, T. Hale Boggs, in order to defraud P. H. Maloney and Jacob Young of their right to be elected Congressman in the Congress of the United States from the Second Congressional District of Louisiana; to defraud and deprive the said Paul H. Maloney and the said Jacob Young of the emoluments of said office, to wit, the sum of Ten Thousand Dollars ($10,000.00) per year for two years; to defraud and deprive the said Paul H. Maloney and the said Jacob Young of their nomination as candidates for the Democratic party in the election for said office; to defraud and deprive Paul H. Maloney and Jacob Young of votes cast for them in said primary election; to defraud and deprive the registered voters of the second precinct of the eleventh ward of New Orleans of the right to cast their votes for Paul H. Maloney and Jacob Young and to have their votes counted as cast; to defraud and deprive the Democratic party of its right to its legally selected nominee for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana; to defraud and deprive the citizens of the Second Congressional District of Louisiana of the congressman of their choice; to defraud and deprive the State of Louisiana and the Secretary of State of Louisiana of the true record and vote cast in said precinct; and to defraud the United States of America and the Congress of the United States of America of the right to have a legally selected congressman from the Second Congressional District of Louisiana;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: That the pretenses, representations, and claims of the defendants herein, that the correct vote cast in said second precinct of the eleventh ward of New Orleans was as follows, to wit:

16

For T. Hale Boggs	526
For Paul H. Maloney	8
For Jacob Young	3

were false, untrue, and fraudulent in this to wit: that the true and correct vote cast in said precinct was:

For T. Hale Boggs	426
For Paul H. Maloney	94
For Jacob Young	17

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: that each and every one of the pretenses, representations, and claims made and intended to be made by the said defendants were false and untrue and intended to be false and untrue, and at all times mentioned herein were known by the said defendants to be false and untrue and were made and intended to be made by the defendants for the purpose of accomplishing the frauds hereinabove described;

That Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann, the defendants herein, on or about the 11th day of September 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this court for the purpose of executing the scheme and artifice aforesaid, unlawfully, fraudulently, and feloniously did knowingly deposit and cause to be deposited in an authorized depository for mail matter of the United States at New Orleans, Louisiana, a certain tally sheet for district offices, a certain tally sheet for parish offices, a certain poll list for district offices and a certain poll list for parish offices enclosed in a postpaid envelope addressed to Hon. Jas. A. Gremillion, Secretary of State, Baton Rouge, Louisiana, to be sent and delivered by the Post Office establishment of the United States, the face and reverse of which tally sheet for district offices were and are of the following tenor, to wit:

"1940 Primary for District Officers

TALLY SHEET

Of the amount of votes of the Democratic Primary Election held in the Second Precinct of the Eleventh Ward of the Parish of Orleans on the 10th day of September A. D. 1940, for Member of Congress, Second Congressional District and for Member of Public Service Commission, First Public Service Commission District.

TALLY

	Offices and names	Amount of votes in letters	Amount of votes in figures
	For Member of Seventy-Seventh Congress of the United States, Second Congressional District—T. Hale Boggs.	Five Hundred and Twenty-six.	526
	For Member of Seventy-Seventh Congress of the United States, Second Congressional District—Paul H. Maloney.	Eight	8
	For Member of Seventy-Seventh Congress of the United States, Second Congressional District—Jacob Young.	Three	3
	For Member of the Louisiana Public Service Commission, First Public Service Commission District—Maurice B. Catlin.	Eight	8
	For Member of the Louisiana Public Service Commission, First Public Service Commission District—Allen H. Johnes.	Three	3
	For Member of the Louisiana Public Service Commission, First Public Service Commission District—Nathaniel B. Knight, Jr.	Five Hundred and Twenty.	520
	For Member of the Louisiana Public Service Commission, First Public Service Commission District—James P. O'Connor, Jr.	One	1
	For Member of the Louisiana Public Service Commission, First Public Service Commission District—Albert O. Rappelet.	0	0
18	For Member of the Louisiana Public Service Commission, First Public Service Commission District—Francis Williams.	Five	5

And having completed the count, which we certify to be correct, we have replaced the ballots thus counted, together with a District poll list showing the names of the voters who cast said ballots and a District tally sheet in the ballot box, which was sealed by us and will be delivered to the Clerk of the Criminal District Court, and will mail a duplicate District poll list showing the names of the voters who cast said ballots and a duplicate District tally sheet to Jas. A. Gremillion, Secretary of State, Baton Rouge, Louisiana, as required by Act 46 of 1940.

1. (Signed) PATRICK B. CLASSIC,
2. (Signed) JOHN A. MORRIS,
3. (Signed) BERNARD W. YEAGER, JR.,
4. (Signed) J. FLEDDERMANN,
5. (Signed) WM. SCHUMACHER,

Commissioners of Election.

Sworn to and subscribed before J. Fleddermann, Commissioner, by_____

(Naming the Commissioners signing and taking oath.)

majority of the Commissioners serving at this, the 2 Precinct poll of Ward 11 of the Parish of ORLEANS, and by me sworn to and subscribed as correct, this 10th day of September A. D. 1940.

(Signed) J. FLEDDERMANN,
Any Commissioner."

That at the time of placing and causing to be placed the said package, tally sheet for district offices, tally sheet for parish offices, poll list for district offices and poll list for parish offices in an authorized depository for mail matter of the United States, aforesaid, the defendants, Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann, then and there well knew that the said package, the said tally sheet for district offices, the said tally sheet for parish offices, the said poll list for district offices, and the said poll list for parish offices were for the purpose of executing the said scheme and artifice and were for the purpose of defrauding Paul H. Maloney, Jacob Young, the legally and qualified registered voters of election precinct two, ward eleven of the City of New Orleans, the Democratic party of the Second Congressional District of Louisiana, the citizens of the Second Congressional District of Louisiana, the State of Louisiana, the Secretary of State of Louisiana, the United States of America and the Congress of the United States; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

19

COUNT SIX

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge: That one Patrick B. Classic, one John A. Morris, one Bernard W. Yeager, Jr., one William Schumacher, and one J. J. Fleddermann, hereinafter called the defendants, together with divers and sundry other persons to your Grand Jurors unknown, heretofore, to wit, on or about September 10, 1940, and continuously up to and including September 11, 1940, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this Court, so having unlawfully, wilfully, knowingly, and fraudulently devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and claims, that is to say, the same scheme and artifice that is set forth and described in the fifth count of this indictment, the allegations concerning which in said fifth count are incorporated by reference thereto in this count as fully as if they were here repeated, and for the purpose of executing said scheme and artifice, unlawfully, fraudulently, and feloniously did knowingly deposit and cause to be deposited in an authorized depository for mail matter of the United States at New Orleans, Louisiana, a certain tally sheet for district offices and a certain poll list for district offices enclosed in a postpaid envelope addressed to Hon. Edw. A. Haggerty, Chairman Demo-

cratic Executive Committee Second Congressional District, New Orleans, Louisiana, to be sent and delivered by the Post Office establishment of the United States, the face of which tally sheet for district offices was and is of the following tenor to wit:

"Second Congressional District

TALLY SHEET

Of the amount of votes of the Democratic Primary Election held in the Second Precinct of the Eleventh Ward in the Parish of Orleans on the 10th day of September A. D. 1940, for Member of the Seventy-Seventh Congress of the United States, from the Second Congressional District of Louisiana, for the term expiring January 3rd, 1943.

20 TALLY

Officers and names	Amount of Votes in Letters	Amount of Votes in Figures
For Member of the Seventy-Seventh Congress of the United States, Second Congressional District.—T. Hale Boggs.	Five Hundred and twenty six.	526
For Member of the Seventy-Seventh Congress of the United States, Second Congressional District.—Paul H. Maloney.	Eight	8
For Member of the Seventy-Seventh Congress of the United States, Second Congressional District.—Jacob Young.	Three	3

We hereby certify that this tally sheet shows a true and correct tabulation of the votes cast at aforesaid precinct for the offices shown hereon and that this tally sheet will be mailed to Edward A. Haggerty, Chairman, Second Congressional District Democratic Executive Committee, New Orleans, La., as required by Act 46 of 1940.

1. (Signed) PATRICK B. CLASSIC,
2. (Signed) JOHN A. MORRIS,
3. (Signed) BERNARD W. YEAGER, Jr.,
4. (Signed) J. FLEDDERMANN,
5. (Signed) WM. SCHUMACHER,

Commissioners of Election.

Sworn to and subscribed before J. Fleddermann, Commissioner, by_____

(Naming the Commissioners signing and taking oath.)

majority of the Commissioners serving at this, the 2nd Precinct poll of Ward 11 of the Parish of Orleans, and by me sworn to and subscribed as correct, this 10th day of September, A. D. 1940.

(Signed) J. FLEDDERMANN,

Any Commissioner."

That at the time of placing and causing to be placed the said package, said tally sheet for district offices and the said poll list

for district offices in an authorized depository for mail matter of the United States, aforesaid, the defendants, Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann, then and there well knew that the said package, the said tally sheet for district offices and the said poll list for district offices were for the purpose of
21 executing the said scheme and artifice and were for the purpose of defrauding Paul H. Maloney, Jacob Young, the legally and qualified registered voters of election precinct two, ward eleven of the City of New Orleans, the Democratic party of the Second Congressional District of Louisiana, the citizens of the Second Congressional District of Louisiana, the State of Louisiana, the Secretary of State of Louisiana, the United States of America and the Congress of the United States; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) RENE A. VIOSCA,
United States Attorney.
(Signed) J. SKELLY WRIGHT,
Assistant U. S. Attorney.
(Signed) HILARY J. GAUDIN,
Assistant U. S. Attorney.
(Signed) ROBERT WEINSTEIN,
Assistant U. S. Attorney.

A true bill.
New Orleans, La., Sept. 25, 1940.
(Signed) E. R. DU MONT, *Foreman.*

22 In United States District Court, Eastern District of Louisiana

[Title omitted.]

Demurrer

Filed October 9, 1940

To the Honorable the Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

Now into court come Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacker, and J. J. Fledermann, defendants in the above numbered and entitled cause, appearing herein through their attorneys, Charles W. Kehl and Fernando J. Cuquet, Jr., and demur to the indictment and for the cause of said demurrer say:

1. That the matters alleged in said indictment and in each count thereof do not constitute any offense against the laws of the United States.

2. That there is no allegation that the citizens and qualified voters of the second precinct of the eleventh ward of N. O. in the Second Congressional District of Louisiana or the Democratic nominees for the office of Congress from the Second Congressional District of Louisiana were deprived of any rights, privileges, or immunities secured and protected by the constitution or laws of the United States on account of said voters and nominees being aliens or by reason of their color or race and that as there was no discrimination whatsoever against the latter within the meaning of the statute the indictment is defective and fails to allege a crime against the U. S.

3. That the allegation in counts 2, 3, and 4 to the effect that the defendants were State officials, are mere conclusions and that the facts set out in the three aforementioned counts are insufficient to constitute the defendants as state officials and that hence
23 counts 2, 3, and 4 do not set out a Federal crime within 18 U. S. C. A. No. 52.

4. That the facts set out in counts 5 and 6 are insufficient to constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises and use of the mails in the execution thereof within the meaning of the mail fraud statute.

Wherefore it is prayed that this demurrer be maintained, the indictment dismissed and the defendants discharged without delay.

(Signed) CHARLES W. KEHL,
(Signed) FERNANDO J. CUQUET, Jr.,
Attorneys for Defendants.

[*Duly sworn to by Patrick B. Classic, Wm. E. Schumacker, J. A. Morris, Jos. J. Fleddermann, Bernard W. Yeager, Jr.; Jurat omitted in printing.*]

24 In United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted.]

Opinion

Filed October 9, 1940

CAILLOUET, J.: There are six (6) counts in the Indictment returned by the Grand Jury, in the above-entitled and numbered case, against Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann.

They have filed a demurrer to said indictment, and insofar as objection is urged to counts 1, 2, 3, and 4, the Court sustains said

demurrer on the ground that no provision of Sections 19 and 20 of the Criminal Code (Secs. 51 and 52, Title 18, U. S. C. A.) refers or has application to the state of facts detailed in said four counts.

The provisions of Section 51, depended upon by the Government as justifying the conspiracy charge covered by count 1, read:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

The count charges that there was a conspiracy—

"* * * to injure, oppress, threaten, and intimidate citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States."

and that, at a primary election held on September 10th, 1940, in accordance with the provisions of Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, for the purpose of selecting and nominating a candidate for the Democratic party to run in the election for the office of Congressman in the Congress of the United States of America, to be held in the Second Congressional District of the State of Louisiana, on November 5th, 1940, in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana, the defendants, then and there serving as Commissioners of Election, in accordance with said Act 46 of 1940, did, as part and purpose of said conspiracy "to injure, oppress, threaten, and intimidate" citizens and registered voters who cast their ballots in said primary election, at the 2nd precinct of the 11th ward of the City of New Orleans, in said Second Congressional District, as well as two of the three candidates for the nomination as Democratic candidate for the Office of Congressman from said District, to be voted on at the General Election of November 5, 1940, change and alter ballots cast for said two candidates to read in favor of the third and successful candidate, and did so mark and report the same, thereby depriving the voters, who had so cast their ballots in favor of either of his two opponents, of the free exercise and enjoyment of their rights and privileges secured to them by the Constitution and laws of the United States, in this wise, to wit: "their rights and privileges to vote and to have their votes counted as cast for the candidate of their choice in said election"; and, furthermore, thereby depriving each of the first mentioned two candidates of their own rights and privileges secured to them by such Constitution and laws, i. e., "by preventing each of them from being legally and properly nominated as a candidate for said office" and by not having counted for them, as cast, all of the votes actually cast for each in said

primary election. The count specifically alleging that "in the Second Congressional District of Louisiana nomination as the candidate of the Democratic party is and has always been equivalent and tantamount to election, and that, without exception, since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected;"

Section 52 provides, in part, as follows:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, * * * shall be fined, etc."

26 The foregoing is depended upon by the Government as justifying the charges covered by counts 2, 3, and 4 to the effect, respectively, that the defendants did "unlawfully, wilfully, knowingly, and feloniously subject and cause to be subjected" not only registered voters of the 2nd precinct of the eleventh ward of the City of New Orleans, in the Second Congressional District of the State of Louisiana, but the two unsuccessful candidates, at said Democratic primary election of September 10, 1940, for the Democratic nomination as Candidate for the office of Congressman at the general election to be held on November 5, 1940, "to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States"; such voters having been deprived, it is alleged, of "their right to cast their votes for the candidates of their choice, and to have their votes counted for such candidate as cast in the Democratic primary election of September 10, 1940," and each of said two unsuccessful candidates, having been deprived of his "rights, privileges and immunities—

(1) to offer himself as a candidate for the office of Congressman in the Congress of the United States for the Second Congressional District of Louisiana;

(2) to be legally and properly nominated as a candidate for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana; and

(3) to have counted for him all votes legally cast for him for said nomination for said office;"

As was held in Newberry et al. vs. United States, 256 U. S. 232, 41 Sup. Ct. 469 (1921), and in prior cases cited by the majority opinion, the source of Congressional power over elections for United States Senators and Representatives is found in Section 4, Article 1, of the Federal Constitution, reading as follows:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." But the "elections" therein referred to are "general" elections and not "primary" elections, which are not final and of themselves do not "elect" anyone to serve either in the Senate or House of Representatives; no power to control party primary elections, such
27 as the Democratic primary election of September 10th, 1940, was ever intended at the time that the Constitution was adopted; "primary" elections for the nominating of candidates for the offices of either Senator or Member of the House of Representatives were not even within the orbit of the Convention's deliberations on the subject of representation in the National Congress, as "primaries" were then unknown; and, as Justice McReynolds pertinently observed in the court's majority opinion, the history of that time indicates "beyond a reasonable doubt" that, if the makers of the Constitution had contended for a construction of Section 4 of Article I that included and affected a State's legally prescribed medium for the nomination of party candidates seeking to be "elected" to either the Senate or the House of Representatives, this would not have been ratified by the State Conventions.

Under the Newberry Case, it must here be said, as was then by the organ of the Court, viz:

"We can not conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections."

The "free exercise or enjoyment" of the right or privilege of participating in the primary election of September 10, 1940, either as voter, or candidate for the Democratic nomination for the office of Congressman, to be voted on at the general election on November 5, 1940, was not "secured," nor "secured and protected," to voter or candidate "by the Constitution or laws of the United States," although the four counts here in question so read.

The provisions of Sections 51 and 52, so depended upon by the Government to support counts 1, and 2, 3, and 4, respectively, of the indictment levelled against the five defendants, could only be made applicable (if these provisions were otherwise susceptible of legal application) to the facts charged as having only come into being in connection with a party primary election held on September 10, 1940, "by stretching old statutes to new uses, to which they are not adapted and for which they were not intended," to use the expression of the Supreme Court, in the case of United States vs. Gradwell, etc., 243 U. S. 476, 37 Sup. Ct. 407 (1917).

28 Clearly, these statutory provisions of 1870 have no application here.

Under both of the foregoing constructions—that of Section 4 of Article 1 of the United States Constitution, as well as that of Sections 19 and 20 of the Criminal Code (Secs. 51 and 52, Title 18 U. S. C. A.)—the demurrer filed must be, and is, SUSTAINED insofar as it relates to the first four of the six counts of the indictment, and the said four counts are hereby DISMISSED.

(Signed A. J. CAILLOUET,
Judge.

29 In United States District Court, Eastern District of Louisiana

Order sustaining demurrer and dismissing first four counts

October 9, 1940

This cause came on this day to be heard upon the demurrer filed on behalf of the defendants herein.

Present: Charles W. Kehl and Fernando J. Cuquet, Jr., Esqs., Attorneys for the defendants, and Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., Wm. Schumacher, and J. J. Fleddermann, the defendants, in person. Rene A. Viosca, Esq., United States Attorney, appearing on behalf of the United States.

Whereupon, after hearing the motion and the statements of counsel for the respective parties and on consideration thereof, the Court, as appears by the written opinion on file herein, sustained the demurrer insofar as it relates to the first four of the six counts of the Indictment, and accordingly dismissed the said four counts.

The Court continued the hearing on the demurrer, as to Counts 5 and 6, until Tuesday, October 22, 1940, at 2:00 o'clock P. M.

30 In United States District Court, Eastern District of Louisiana

[Title omitted.]

Judgment and decree

Filed October 14, 1940

On the 9th day of October 1940, came the United States of America by Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, and came the defendants Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann, appearing in their own proper persons and by Charles W. Kehl and Fernando J. Cuquet, Jr., their attorneys, and a hearing was, then and there, had of said defendants' demurrer to the indictment in the above entitled

cause, insofar as said demurrer relates to counts 1, 2, 3, and 4 of said indictment, but not as to counts 5 and 6 thereof, the hearing as to which two counts was deferred until October 22, 1940, at 2:00 o'clock P. M.

The matter at issue having been argued by counsel and duly submitted to the Court for decision, it is, therefore, now

Ordered, adjudged, and decreed by the Court, for the reasons set forth in the written opinion of the Court filed in these proceedings, on said October 9, 1940, that the demurrer be, and it is, hereby, sustained insofar as it relates to counts 1, 2, 3, and 4 of the indictment, and that each of said four mentioned counts be, and the same is, hereby quashed and dismissed.

New Orleans, October 14th, 1940.

(Signed) A. J. CAILLOUET,
Judge.

31 In United States District Court, Eastern District of Louisiana

[Title omitted.]

Petition for appeal

Filed November 7, 1940

Comes now the United States of America, plaintiff herein, and states that in an opinion rendered on October 9, 1940, and in a judgment filed on October 14, 1940, the District Court of the United States for the Eastern District of Louisiana sustained a demurrer to and quashed and dismissed certain counts of the indictment herein, including Counts 1 and 2, and the United States of America feeling aggrieved at the ruling of said District Court in sustaining the demurrer to and quashing and dismissing Counts 1 and 2, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment, and that a transcript of the record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,

(Signed) RENE A. VIOSCA,
United States Attorney for the Eastern District of Louisiana.

(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney.

38 In United States District Court, Eastern District of Louisiana

[Title omitted.]

Assignments of error

Filed November 7, 1940

Comes now the United States of America by Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, and avers that in the record proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the Court erred in sustaining as to Counts 1 and 2 the demurrer to the indictment and in quashing and dismissing those counts.

2. That the Court erred in its interpretation and construction of U. S. C., Title 18, Sections 51 and 52.

3. That the Court erred in holding that a conspiracy to deprive citizens of their right to have their votes counted as cast for the candidate of their choice at a Congressional primary is not punishable under U. S. C., Title 18, Section 51.

4. That the Court erred in holding that the conduct of election officials, acting under color of state law, in depriving voters, who were inhabitants of the State of Louisiana, to their right to have their votes counted as cast for the candidate of their choice at a Congressional primary is not punishable under U. S. C., Title 18, Section 52.

39 5. That the Court erred in holding that the right of a voter at a Congressional primary to have his vote counted as cast for the candidate of his choice is not a right, privilege or immunity secured and protected by the Constitution of the United States.

(Signed) RENE A. VIOSCA,
United States Attorney for the Eastern District of Louisiana.
(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney.

40 In United States District Court, Eastern District of Louisiana

[Title omitted.]

Order allowing appeal

Filed November 7, 1940

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for the reversal of the judgment in this cause insofar as it sustained a demurrer to and quashed and dismissed Counts 1 and 2 of the indictment in said cause, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered such petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court, Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the judgment of this Court sustaining the demurrer to and quashing and dismissing Counts 1 and 2 of the indictment, to the Supreme Court of the United States and that a duly certified copy of the record of said
41 cause be transmitted to the Clerk of the Supreme Court.

It is further ordered that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Baton Rouge, La., this 7th day of November 1940.

By the Court:

(Signed) A. J. CAILLOUET,
United States District Judge.

43 [Citation in usual form showing service on Chas. Kehl, et al. omitted in printing.]

44 In United States District Court, Eastern District of Louisiana

[Title omitted.]

Praecipe for transcript of record

Filed November 7, 1940

To the Clerk, United States District Court for the Eastern District of Louisiana:

The appelant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the Eastern District of Louisiana, in connection with its appeal to the Supreme Court of the United States, you include the following:

1. Indictment.
2. Demurer.
3. Opinion.
4. Judgment.
5. Minute entries.
6. Petition for appeal to the Supreme Court.
7. Statement of jurisdiction of Supreme Court.
8. Assignments of error.
9. Order allowing appeal.
10. Notice of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement as to jurisdiction.
11. Citation.
12. Praecipe.

45 (Signed) RENE A. VIOSCA,
United States Attorney for the Eastern District of Louisiana.

(Signed) ROBERT WEINSTEIN,
Assistant U. S. Attorney.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 8th day of November 1940.

(Signed) CHAS. KEHL,
(Signed) F. J. CUQUET, Jr.,
per W. O. C.
(Signed) WARREN O. COLEMAN,
Counsel for Appellees.

46 [Clerk's certificates to foregoing transcript omitted in printing.]

47 In the Supreme Court of the United States

[Title omitted.]

Statement of points to be relied upon and designation of record

Filed Dec. 19, 1940

Pursuant to Rule 13, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

FRANCIS BIDDLE,
Solicitor General.

1940.

Service of the above Statement of Points and Designation of Record is acknowledge this 16th day of December 1940.

CHAS. KEHL,
F. CUQUET,
Per M. O. C.
Counsel for Appellees.
WARREN O. COLEMAN,

[Endorsement on cover:] File No. 44967. E. Louisiana, D. C. U. S. Term No. 618. The United States of America, Appellant, vs. Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann. Filed December 12, 1940. Term No. 618 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, APPELLANT

v.

PATRICK H. CLASSIC, JOHN A. MOSES, BERNARD W. VEASEY, JR., WILLIAM SCHUMACHER, AND J. J. FITZSIMMONS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

STATEMENT AS TO JURISDICTION

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In the District Court of the United States for the Eastern District of Louisiana

Crim. No. 20067

UNITED STATES OF AMERICA

v.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN

STATEMENT OF JURISDICTION

(Filed November 7, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith the statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by United States Code, Title 18, Section 682, otherwise known as the "Criminal Appeals Act," and by United States Code, Title 28, Section 345.

B. The statutes of the United States, the construction of which are involved herein, are U. S. C., Title 18, Sections 51 and 52 (Sections 19 and 20 of the Criminal Code).

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SECTION 51. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States (R. S. § 5508; Mar. 4, 1909, c. 321, § 19, 35 Stat. 1092).

SECTION 52. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (R. S. § 5510; Mar. 4, 1909, c. 321, § 20, 35, Stat. 1092.)

C. The opinion and judgment of the District Court sought to be reviewed were entered October 9 and 14, 1940, and the petition for appeal was filed November 7, 1940, and it is presented to the District Court herewith, to wit, on the 7th day of November 1940.

The indictment in this case contains six counts. A demurrer was filed as to all of the counts. The District Court sustained the demurrer as to the first four counts but postponed hearing as to the last two counts. Subsequently on October 31, 1940 the District Court overruled the demurrer as to counts five and six. The Government appeals only from the ruling of the District Court sustaining the demurrer as to Counts 1 and 2 and dismissing and quashing those counts.

Count 1 is based upon that portion of U. S. C., Title 18, Section 51, which is quoted *supra*. This count charged that the defendants named served as Commissioners of Election, under the laws of the State of Louisiana, in the Second Precinct of the Eleventh Ward of the City of New Orleans at a primary election held on September 10, 1940, for the purpose of nominating a candidate of the Democratic Party for Representative in Congress from the Second Congressional District of Louisiana. It was alleged that these defendants conspired to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, *i. e.*, (1) the right of registered voters who cast their ballots at this primary election to vote and to have their votes counted as cast for the candidate of their choice, and (2) the right of certain candidates at this primary election to have all

votes cast for them counted as cast.[1] The count charged as overt acts that the defendants changed numerous ballots which were cast for one candidate and marked and counted them as votes for another candidate, and that they falsely certified the number of votes cast for the respective candidates.

The second count is based upon U. S. C., Title 18, Section 52, which is quoted *supra*. It charged that the same defendants, acting under color of a statute of Louisiana, wilfully subjected registered voters at the same primary, which voters were inhabitants of the State of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, *i. e.*, their right to cast their votes for the candidate of their choice and to have their votes counted as cast. The count further charged that this deprivation was effected by the failure and refusal of the defendants to count votes as cast, by their alteration of ballots, and by their false certification of the number of votes cast for the respective candidates.

The District Court in sustaining the demurrer to Counts 1 and 2 construed Sections 51 and 52 as not embracing the offenses charged in those counts.

[1] The Government in this case is not seeking to sustain the application of Sections 51 and 52 to the rights of candidates at primary elections. Consequently, it is not challenging the ruling of the District Court insofar as it applies to the second object of the conspiracy charged in the first count and to the third and fourth counts.

In reliance upon the majority opinion of this Court in *Newberry* v. *United States,* 256 U. S. 232, and the construction therein of Section 4 of Article I of the Constitution of the United States, the District Court held that the right or privilege of voting at primary elections for the nomination of candidates for the office of member of the House of Representatives was not "secured" or "secured and protected" by the Constitution or laws of the United States, and hence was not a right the deprivation of which could be punished under Sections 51 and 52. The Court also held that the application to the facts charged of Sections 51 and 52, which were enacted before primary elections came into existence, would result, in the language of *United States* v. *Gradwell,* 243 U. S. 476, in "stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

The questions presented in the instant case are, we believe, of paramount public importance. The relationship between a primary election and the ensuing general election is so intimate that the outcome of the former is often determinative of the latter. This is particularly so in those sections of the country where nomination is tantamount to election and the election becomes merely perfunctory. Hence, a voter may be as effectually deprived of his right or privilege of participating in the final selection of Senators and Representatives where acts such as those charged in the indictment were

committed at a primary as where they took place at the general election.

The court below did not deny these self-evident facts but relied instead upon what is conceived to be the opinion of this Court in the *Newberry* case. But only a minority of the Court concurred in the chief opinion, which held broadly that the Federal Corrupt Practices Act was invalid as applied to primary elections for the nomination of Senators, and even that opinion emphasized that the statute was enacted prior to the Seventeenth Amendment (256 U. S. at 254). Four Justices thought the Act constitutional and one thought it invalid because enacted prior to the Seventeenth Amendment, but reserved opinion as to the power of Congress under that Amendment.[2]

The court below also intimated that a statute enacted in 1870 could have no application to a primary held in 1940, probably because primary elections were unknown when Sections 51 and 52 were enacted. But those sections punish, in broad terms, the deprivation of rights and privileges secured by the Constitution and laws of the United States. Nothing in their language indicates an intention to leave unprotected the exercise of those rights and privileges through procedures subse-

[2] Sections 51 and 52, of course, were also enacted prior to the Seventeenth Amendment, but the question here is not the general validity of the statute, as in the *Newberry* case, but the validity of the present application of Sections 51 and 52.

quently developed. *United States* v. *Gradwell*, 243 U. S. 476, is not necessarily opposed, for there the Court emphasized "some strikingly unusual features of the West Virginia law under which the primary was held" (243 U. S. at 487).[a] So far as it amounts to a broad holding that a statute legislating in general terms is to be restricted to the specific instances envisioned by Congress at the time of its enactment, the *Gradwell* case is no longer followed by this Court. See *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257–259; *United States* v. *Thind*, 261 U. S. 204, 207–208; *Ozawa* v. *United States*, 260 U. S. 178, 195–196. In *Hague* v. *C. I. O.* 307 U. S. 496, 512–514, 532, four members of the Court agreed that free discussion of the National Labor Relations Act was a privilege and immunity of citizens of the United States and four members agreed that this purpose, together with others unknown to Congress when it enacted the jurisdictional provisions of the Civil Rights Act of 1871, were privileges and immunities secured by the Con-

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[a] The West Virginia provisions permitted candidates to be nominated by petition for the general election, irrespective of the outcome of the primary. In contrast, the Louisiana election laws prescribe that "all political parties shall make all nominations of candidates for * * * Members of the House of Representatives in the Congress of the United States * * * by direct primary elections," and prohibit the Secretary of State from placing on the ballot any candidate for any political party who was not so nominated. Laws of 1940, Act No. 46, Sec. 1.

stitution and laws of the United States. Neither ruling would be possible under any broad application of the *Gradwell* case.

If, as we submit, a primary election is such an integral part of the elective process that free election cannot be assured unless the rights of voters at the primaries are protected from corruption, fraud or violence, it would seem that their rights are as much within the protection of Sections 51 and 52 as are the rights of voters at general elections. It is well settled that the right to vote for members of Congress at general elections and to have such vote counted as cast is a right secured to the voter by the Constitution within the meaning of Section 51. *Ex parte Yarbrough,* 110 U. S. 652; *United States* v. *Mosley,* 238 U. S. 383.

D. The following decisions sustain the jurisdiction of the Supreme Court under that provision of the Criminal Appeals Act allowing a direct appeal to the Supreme Court "From a decision or judgment * * * sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the * * * construction of the statute upon which the indictment is founded":

> *United States v. Patten,* 226 U. S. 525, 535; *United States* v. *Birdsall,* 233 U. S. 223, 230; *United States* v. *Kapp,* 302 U. S. 214, 217; *United States v. Borden Co.,* 308 U. S. 188, 192–193.

It may also be suggested that the jurisdiction of the Supreme Court may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, when the defendants have not been put in jeopardy. See *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Thompson*, 251 U. S. 407; *United States* v. *Goldman*, 277 U. S. 229.

Appended hereto is a copy of the opinion of the District Court rendered on October 9, 1940.

Respectfully submitted.

(Signed) FRANCIS BIDDLE,
Solicitor General.

(Signed) RENE VIOSCA,
United States Attorney for the Eastern District of Louisiana.

(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney.

EXHIBIT F

United States District Court, Eastern District of Louisiana, New Orleans Division

(No. 20067 Criminal)

UNITED STATES OF AMERICA

v.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, J. J. FLEDDERMANN

OPINION

(Filed October 9th, 1940)

CAILLOUET, *J.*: There are six (6) counts in the Indictment returned by the Grand Jury, in the above-entitled and numbered case, against PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, and J. J. FLEDDERMANN.

They have filed a demurrer to said indictment, and insofar as objection is urged to counts 1, 2, 3, and 4, the Court sustains said demurrer on the ground that no provision of Sections 19 and 20 of the Criminal Code (Secs. 51 and 52, Title 18, U. S. C. A.) refers or has application to the state of facts detailed in said four counts.

The provisions of Section 51, depended upon by the Government as justifying the conspiracy charge covered by count 1, read:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, * * *.

The count charges that there was a conspiracy—

> * * * to injure, oppress, threaten, and intimidate citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States.

and that, at a primary election held on September 10th, 1940, in accordance with the provisions of Act No. 46 of the Regular Session of the Legislature of the State of Louisiana for the year 1940, for the purpose of selecting and nominating a candidate for the Democratic Party to run in the election for the office of Congressman in the Congress of the United States of America, to be held in the Second Congressional District of the State of Louisiana, on November 5th, 1940, in accordance with the provisions of the Constitution and laws of the United States and of the State of Louisiana, the defendants, then and there serving as Commissioners of Election, in accordance with said Act 46 of 1940, did, as part and purpose of said conspiracy "to injure, oppress, threaten, and intimidate" citizens and registered voters who cast their ballots in said primary election, at the 2nd precinct of the 11th ward of the City of New Orleans, in said Sec-

ond Congressional District, as well as two of the three candidates for the nomination as Democratic candidate for the office of Congressman from said District, to be voted on at the General Election of November 5, 1940, change and alter ballots cast for said two candidates to read in favor of the third and successful candidate, and did so mark and report the same, thereby depriving the voters, who had so cast their ballots, in favor of either of his two opponents, of the free exercise and enjoyment of their rights and privileges secured to them by the Constitution and laws of the United States, in this wise, to wit: "their rights and privileges to vote and to have their votes counted as cast for the candidate of their choice in said election"; and, furthermore, thereby depriving each of the first mentioned two candidates of their own rights and privileges secured to them by such Constitution and laws, i. e., "by preventing each of them from being legally and properly nominated as a candidate for said office" and by not having counted for them, as cast, all of the votes actually cast for each in said primary election. The count specifically alleging that "in the Second Congressional District of Louisiana nomination as the candidate of the Democratic Party is and has always been equivalent and tantamount to election, and that, without exception, since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected."

Section 52 provides, in part, as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully

> subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. * * * shall be fined, etc.

The foregoing is depended upon by the Government as justifying the charges covered by counts 2, 3, and 4 to the effect, respectively, that the defendants did "unlawfully, wilfully, knowingly, and feloniously subject and cause to be subjected" not only registered voters of the 2nd precinct of the eleventh ward of the City of New Orleans, in the Second Congressional District of the State of Louisiana, but the two unsuccessful candidates, at said Democratic primary election of September 10, 1940, for the Democratic nomination as Candidate for the office of Congressman at the general election to be held on November 5, 1940, "to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States"; such voters having been deprived, it is alleged, of "their right to cast their votes for the candidates of their choice, and to have their votes counted for such candidate as cast in the Democratic primary election of September 10, 1940.", and each of said two unsuccessful candidates, having been deprived of his "rights, privileges, and immunities—

> (1) to offer himself as a candidate for the office of Congressman in the Congress of the United States for the Second Congressional District of Louisiana;
>
> (2) to be legally and properly nominated as a candidate for the office of Congressman

in the Congress of the United States from the Second Congressional District of Louisiana; and

(3) to have counted for him all votes legally cast for him for said nomination for said office";

As was held in *Newberry et al.* vs. *United States*, 256 U. S. 232, 41 Sup. Ct. 469 (1921), and in prior cases cited by the majority opinion, the source of Congressional power over elections for United States Senators and Representatives is found on Section 4, Article 1, of the Federal Constitution, reading as follows:

> The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

But the "elections" therein referred to are "general" elections and not "primary" elections, which are not final and of themselves do not "elect" anyone to serve either in the Senate or House of Representatives; no power to control party primary elections, such as the Democratic primary election of September 16th, 1940, was ever intended at the time that the Constitution was adopted; "primary" elections for the nominating of candidates for the offices of either Senator or Member of the House of Representatives were not even within the orbit of the Convention's deliberations on the subject of representation in the National Congress, as "primaries" were then unknown; and, as Justice McReynolds pertinently observed in the court's

majority opinion, the history of that time indicates "beyond a reasonable doubt" that, if the makers of the Constitution had contended for a construction of Section 4 of Article 1 that included and affected a State's legally prescribed medium for the nomination of party candidates seeking to be "elected" to either the Senate or the House of Representatives, this would not have been ratified by the State Conventions.

Under the Newberry Case, it must *here* be said, as was *then* by the organ of the Court, viz:

> We can not conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections.

The "free exercise or enjoyment" of the right or privilege of participating in the primary election of September 10, 1940, either as voter, or candidate for the Democratic nomination for the office of Congressman, to be voted on at the general election on November 5, 1940, was *not* "secured," nor "secured and protected," to voter or candidate "by the Constitution or laws of the United States," although the four counts here in question so read.

The provisions of Sections 51 and 52, so depended upon by the Government to support counts 1, 2, 3, and 4, respectively, of the indictment levelled against the five defendants, could only be made applicable (if these provisions were otherwise susceptible of legal application) to the facts charged as having only come into being in connection with a party primary election held on September 10, 1940, "by stretching old statutes to new uses, to which

they are not adapted and for which they were not intended;" to use the expression of the Supreme Court, in the case of *United States* vs. *Gradwell*, etc., 243 U. S. 476, 37 Sup. Ct. 407 (1917).

Clearly, these statutory provisions of 1870 have no application here.

Under both of the foregoing constructions—that of Section 4 of Article 1 of the United States Constitution, as well as that of Sections 19 and 20 of the Criminal Code (Secs. 51 and 52, Title 18 U. S. C. A.)—the demurrer filed must be, and is, SUSTAINED insofar as it relates to the first four of the six counts of the indictment, and the said four counts are hereby DISMISSED.

(Signed) A. J. CAILLOUET,
Judge.

NEW ORLEANS, LOUISIANA,
October 9th, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 618

THE UNITED STATES OF AMERICA, APPELLANT

v.

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 18–22) is reported in 35 F. Supp. 66.

JURISDICTION

The judgment of the District Court sustaining a demurrer to the first four counts of the indictment was entered on October 14, 1940 (R. 22). The order allowing an appeal from the judgment sustaining the demurrer to the first two counts was entered on November 7, 1940 (R. 25). Probable jurisdiction was noted by this Court on January 6,

1941. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

An indictment under Sections 19 and 20 of the Criminal Code alleges that the defendant Commissioners of Election, conducting a primary election under Louisiana law to designate the candidate of the Democratic Party for a seat in the House of Representatives, conspired to alter the ballots cast by qualified voters and falsely to certify the number of votes cast for the respective candidates, and did alter such ballots and make such false certification. It is alleged that in Louisiana designation as the candidate of the Democratic Party is equivalent to election. The sufficiency of the indictment to charge violations of the statute turns upon the following questions:

1. Whether the right of a qualified voter to vote in the Louisiana primary election and to have his vote counted as cast by the Commissioners of Election is a right secured or protected by Article I of the Constitution of the United States.

2. Whether the acts of the Commissioners of Election discriminating against the qualified voters whose votes were altered and counted for a

candidate not of their choice, deprived those voters of the equal protection of the laws, secured or protected by the Fourteenth Amendment.

3. Whether the right of a qualified voter to have his ballot counted as cast in a Louisiana Congressional primary election is among the constitutional rights which Sections 19 and 20 of the Criminal Code protect; and whether the sections are otherwise applicable to the acts alleged in the indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 2 and 4 of Article I of the Constitution, the pertinent provisions of the Fourteenth Amendment, Sections 19 and 20 of the Criminal Code, and the material provisions of the Louisiana statutes regulating primary and general elections are set forth in the Appendix.

Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51), in so far as material, provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

Section 20 of the Criminal Code (U. S. C., Title 18, Sec. 52) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

STATEMENT

The appellees were indicted in six counts on September 25, 1940, in the United States District Court for the Eastern District of Louisiana, New Orleans Division (R. 1–17). Their demurrer to the indictment (R. 17–18) was sustained as to the first four counts (R. 22–23) which charged violations of Sections 19 and 20 of the Criminal Code (U. S. C., Title 18, Sections 51, 52). The Government appealed from the judgment in so far as it sustained the demurrer to the first two counts (R. 23, 25).

The first count (R 1-4) alleged that an election of a Representative in Congress for the Second Congressional District of Louisiana was to be held on November 5, 1940. On September 10, a primary

election was held in accordance with Louisiana law, for the purpose of nominating a candidate of the Democratic Party for that office. In the Second Congressional District of Louisiana, nomination as the candidate of the Democratic Party is and always has been equivalent to election; without exception the Democratic nominee has been elected since the adoption of the first Louisiana primary election law in 1900.

There were three candidates in the primary, T. Hale Boggs, Paul H. Maloney, and Jacob Young. The defendants were Commissioners of Election, selected in accordance with the Louisiana statute to conduct the primary in the Second Precinct of the Tenth Ward of the City of New Orleans. Five hundred and thirty-seven citizens and qualified voters voted in this precinct.

The charge was that the defendants, who were affiliated with a faction supporting T. Hale Boggs, conspired with each other and with others unknown, to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, namely, (1) the right of qualified voters who cast their ballots in this primary election to vote and to have their votes counted as cast for the candidate of their choice; and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast. The overt acts alleged were that the defendants

changed eighty-three ballots cast for Paul H. Maloney and fourteen cast for Jacob Young, marking and counting them as votes for T. Hale Boggs, and that they falsely certified the number of votes cast for the respective candidates to the Chairman of the Second Congressional District Committee.

The second count (R. 4–6) charged that the defendants as Commissioners of Election, wilfully and under color of law subjected registered voters at the primary, who were inhabitants of Louisiana, to the deprivation of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, namely, their right to cast their votes for the candidates of their choice and to have their votes counted as cast. Repeating the allegations of the first count, it is charged that this deprivation was effected by the wilful failure and refusal of the defendants to count votes as cast, by their alteration of ballots and by their false certification of the number of votes cast for the respective candidates.

The District Court, in sustaining the demurrer, held that the facts alleged do not constitute an offense under Section 19 or Section 20 of the Criminal Code (U. S. C., Title 18, Secs. 51, 52). Relying upon the opinion of Mr. Justice McReynolds in *Newberry* v. *United States,* 256 U. S. 232, in which three of the Justices concurred, the District Court concluded that Congress has no authority under Article I, Section 4 of the Constitution to

regulate primary elections; that the right of a qualified voter to vote at a primary election held to nominate a candidate for a seat in the House of Representatives is not a right "secured" or "protected" by the Constitution or laws of the United States; and, finally, that the application of Sections 19 and 20 of the Criminal Code to primary elections, which came into existence long after the statute was first enacted, would result, in the language of *United States* v. *Gradwell*, 243 U. S. 476, 488–489, in "stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

SPECIFICATION OF ERRORS TO BE URGED

The Court erred:

1. In sustaining as to Counts 1 and 2 the demurrer to the indictment and in quashing and dismissing those counts.

2. In its interpretation and construction of U. S. C., Title 18, Sections 51 and 52.

3. In holding that a conspiracy to deprive citizens of their rights to have their votes counted as cast for the candidate of their choice at a Congressional primary is not punishable under U. S. C., Title 18, Section 51.

4. In holding that the conduct of election officials, acting under color of state law, in depriving voters, who were inhabitants of the State of Louisiana, of their right to have their votes counted as cast for the candidate of their choice at a Con-

gressional primary is not punishable under U. S. C., Title 18, Section 52.

5. In holding that the right of a voter at a Congressional primary to have his vote counted as cast for the candidate of his choice is not a right, privilege, or immunity secured and protected by the Constitution of the United States.

SUMMARY OF ARGUMENT

Section 19 of the Criminal Code makes criminal any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States". Section 20 provides punishment for anyone who, acting under color of law, deprives any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States". The Government contends that the right of a qualified voter in a Louisiana Congressional primary election to have his vote counted as cast is secured by Artiele I of the Constitution; that voters are deprived of the equal protection of the laws if state election officials wilfully count their votes cast for two of the contending candidates in favor of the third; and that Sections 19 and 20 apply to the deprivation of these rights alleged in the indictment.

I

The right of a qualified voter to have his vote counted as cast in a Democratic Congressional pri-

mary in Louisiana is secured and protected by Article I of the Consitution of the United States. Section 2 of Article I confers the right to choose representatives upon qualified electors of the most numerous branch of the several state legislatures. The members of the class are determined by state law but as this Court has frequently held, the right of those members to choose is granted by the federal Constitution. The right thus granted is protected against interference by private individuals as well as by the States and Sections 19 and 20 are designed to afford protection against both types of interference. *Ex parte Yarbrough,* 110 U. S. 651, and *United States* v. *Mosley,* 238 U. S. 383, involved interference with voting at general Congressional elections. The Government contends that the constitutional right to *choose* is likewise impaired by interference with the voting at a Democratic Congressional primary in Louisiana.

Under the laws of Louisiana, the primary is a part of the election machinery of the State. Conducted by State officers at public expense, its function is not confined to the designation of party nominees; it also eliminates candidates from the general election. A candidate defeated in a primary is legally precluded from running as an independent in the final election; and those who voted for him in the primary have no way of expressing their choice of him at the general election. Moreover, in the practical exercise of the right to choose,

in Louisiana, the Democratic primary is not only an integral part of the process of choice; it is the determinative part.

In securing the right to choose Congressmen, Article I, Section 2, is concerned with realities, not with forms. If a state prefers to conduct Congressional elections in two steps rather than in one, the protection of the section reaches to both. Where, as in Louisiana, the first step is not only important but is actually decisive, both in law and in fact, the Constitutional guarantee necessarily applies.

Neither *United States* v. *Gradwell,* 243 U. S. 476, nor *Newberry* v. *United States,* 256 U. S. 232, nor *Grovey* v. *Townsend,* 295 U. S. 45, prevents such a realistic analysis. In *Gradwell* the question of whether a primary should be treated generally as a part of the election was expressly reserved. The division of the Court in *Newberry* leaves the decision an authority of limited scope and force. The case involved a Senatorial rather than a Congressional primary; the indictment was based upon a statute enacted prior to the adoption of the Seventeenth Amendment, and the deciding Justice indicated that he regarded this fact as determinative. Thus a majority of the Court accepted the view that a primary is not a part of the election of Senators, within the meaning of Article I, Section 4, only as long as the choice of Senators was vested in the State legislatures. The status of the primary as

an integral part of the process of popular choice was not involved. Moreover, the issue was not as to the source of the right to vote but as to the power to regulate the campaign; and the primary election involved did not eliminate candidates from the general election. The Texas primary election in the *Grovey* case differed significantly from that involved in the instant case and the voters were not there as here deprived of an opportunity to express their choice in any other way.

Finally, Congress both before and after the *Newberry* case, has recognized the vital influence of the primary upon the final choice, by inquiring into the conduct of primary, as well as general election campaigns in determining the qualification of its members and passing on contested elections.

II

Qualified voters are also deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment if state officers count the votes cast for one candidate and wilfully refuse to count those cast for the others. In receiving and counting ballots, and certifying the results in a primary election, the Commissioners of Election are state officers, and their action, under color of their office, even though contrary to state law, constitutes "state action" within the meaning of the equal protection clause of the Fourteenth Amendment. *Ex parte Virginia*, 100 U. S. 339, 347; *Iowa-Des Moines*

Bank v. *Bennett*, 284 U. S. 239, 245–246; *Mosher* v. *City of Phoenix*, 287 U. S. 29. It is also clear that Congress may make criminal the acts of state officials which effect a denial of equal protection (*Ex parte Virginia, supra*), and that the equal protection clause prohibits unjustifiable discrimination by the State with respect to voting at primary elections (*Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73). It is without significance that the arbitrary discrimination was not based upon race or color, since the equal protection clause affords a far broader guarantee. Nor need the denial of equal protection be habitual. It is true that inadvertent inequalities produced by the administrators of state laws do not violate the Fourteenth Amendment. But when arbitrary inequality is designedly produced by state officials, the discrimination constitutes a denial of equal protection. While in cases involving administrative inequalities, the unjustifiable discrimination which works a deprivation of equal protection has been characterized as "systematic" (*Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 245), we take this to mean that the inequality must be produced by conscious and deliberate discrimination, not that it must be repetitious.

III

Assuming that the right of a voter to have his vote counted as cast in a Congressional primary is

a right "secured" and "protected" by the Constitution of the United States, the question remains whether Sections 19 and 20 are otherwise applicable to the acts alleged in the indictment. We contend that they are.

(1) The District Court emphasized the fact that primary elections were not in existence in 1870, when Sections 19 and 20 were first enacted, and, quoting *United States* v. *Gradwell,* 243 U. S. 476, 488–489, it concluded that the application of the statutes was unwarranted as "stretching old statutes to new uses." But the statutes are addressed in "sweeping general words" to conspiracies against and deprivations of federal rights. *United States* v. *Mosley,* 238 U. S. 383, 387–388. Section 19 has been applied in the past to such diverse rights as that to inform of a federal crime and that to stand by a federal homestead. Both sections employ general words which extend their guarantee to any right secured or protected by the Constitution. Nor is it significant that in 1894 Congress repealed the companion provisions of the statute dealing with specific irregularities in elections, since *United States* v. *Mosley, supra,* definitively held that the right to vote still falls within the general protection which the statute "most reasonably affords."

(2) The first count of the indictment rests upon Section 19, which is in terms applicable to the acts of individuals. The count may nevertheless be sus-

tained on the theory that the voters were deprived of rights secured against state action by the Fourteenth Amendment. Nothing in the language or legislative history of the statute requires the interpretation that it is inapplicable to conspiracies to use state power to deprive citizens of rights which are constitutionally safeguarded against state action. Nor does the enabling clause of the Fourteenth Amendment suggest that "appropriate legislation" must be confined to that which deals exclusively with rights guaranteed by that Amendment and with state action which infringes them. In any event, the point was settled *sub silentio* in *Guinn* v. *United States,* 238 U. S. 347, 368.

(3) The acts of the defendants alleged in the indictment were done "under color" of "law" or "statute", within the meaning of Section 20. The Section was originally enacted to enforce the Fourteenth Amendment. There is nothing to require that it be afforded a narrower scope than the Amendment itself, and it is clear that the acts alleged constitute "state action" forbidden by the Amendment, even though they were contrary to State law. The Congressional purpose to provide a broad protection is apparent on the face of the statute. The purpose would be frustrated if the statute applied only when the forbidden discrimination is articulately ordained by an invalid State law. It is enough that it is made possible by the defendant's official power.

(4) That Section 20 is not limited to the deprivation of federal rights on account of color, race, or alienage is demonstrable as a matter of grammar. The only sensible construction of the statute is that it forbids the subjection of inhabitants (1) to the deprivation of federal rights; and (2) to different punishments, on account of alienage, color, or race, "than are prescribed for the punishment of citizens".

ARGUMENT

Section 19 of the Criminal Code makes criminal any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States". Section 20 provides punishment for anyone who, acting under color of law, deprives any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States". The District Court held that qualified voters in a Louisiana Congressional primary election are not deprived of a right secured or protected by the Constitution[1] when state election officials deliberately refuse to count their votes as cast and count them in favor of an opposing candidate. We contend that the right thus infringed is protected both by Article I of the Constitution and by the Fourteenth Amendment, and that the statutes apply to the acts alleged in the indictment.

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[1] There are no "laws of the United States" other than Sections 19 and 20 themselves which secure or protect this right. Cf. *United States* v. *Waddell*, 112 U. S. 76.

I

THE RIGHT OF A QUALIFIED VOTER TO HAVE HIS VOTE COUNTED AS CAST IN A DEMOCRATIC CONGRESSIONAL PRIMARY IN LOUISIANA IS SECURED AND PROTECTED BY ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES

1. *The Constitutional Basis of the Right to Choose United States Representatives.*—The right to choose members of Congress is secured and protected by Section 2 of Article I of the Constitution of the United States:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

By the terms of this section, those qualified to vote for the larger house of the state legislature are entitled to choose United States Representatives: the members of the class are determined by state law, but the right of the members to choose is granted by the Federal Constitution.[2] In a series

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[2] The frequent statement that the right to vote derives from the states (see, *e. g.*, *Minor* v. *Happersett*, 21 Wall. 162, 178; *United States* v. *Reese*, 92 U. S. 214, 217–218; *McPherson* v. *Blacker*, 146 U. S. 1, 38–39; *Breedlove* v. *Suttles*, 302 U. S. 277, 283) applies to the right to vote for members of Congress only in the sense that the states may thus indirectly determine the qualifications of the electors, subject, of course, to the Fourteenth, Fifteenth, and Nineteenth Amendments (see *Pope* v. *Williams*, 193 U. S. 621, 632–634; *Guinn* v.

of historic decisions this Court has recognized the Constitutional origin of this right. *Ex parte Yarbrough,* 110 U. S. 651; *Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487; *United States* v. *Mosley,* 238 U. S. 383. See also *Ex parte Siebold,* 100 U. S. 371; *In re Coy,* 127 U. S. 731. As the Court said in *Ex parte Yarbrough,* 110 U. S. at 663:

> * * * they [the States] define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualification of its own electors for members of Congress.

Unlike the rights guaranteed by the Fourteenth and Fifteenth Amendments,[3] the right to choose members of Congress is secured against interference by private individuals, as well as against interference by action of the states. Congress may

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United States, 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368) and any other limitations which may be found in the Constitution itself. That Congress regards the right to vote as a "right of citizens of the United States," is indicated by subdivisions (13) and (15) of Section 24 of the Judicial Code (U. S. C., Title 28, Sec. 41 (11) and Sec. 41 (15)).

[3] See, *e. g., United States* v. *Cruikshank,* 92 U. S. 542, 554–555; *United States* v. *Harris,* 106 U. S. 629; *Civil Rights Cases,* 109 U. S. 3; *Hodges* v. *United States,* 203 U. S. 1; *United States* v. *Powell,* 151 Fed. 648 (C. C. N. D. Ala.), affirmed, 212 U. S. 564; *Grovey* v. *Townsend,* 295 U. S. 45. Cf. *United States* v. *Wheeler,* 254 U. S. 281.

protect the right by providing for the punishment of both types of interference and has done so by Sections 19 and 20 of the Criminal Code. In both *Ex parte Yarbrough, supra* and *United States* v. *Mosley, supra,* the right to choose members of the House of Representatives was impaired by interference with voting at general Congressional elections.[4] The Government contends that interference with the voting at a Louisiana Congressional primary likewise impairs the right to choose, and, therefore, constitutes an injury to the "free exercise or enjoyment" of a right "secured by the Constitution of the United States" and a "deprivation" of such a right, within the meaning of the statute.

2. *The Louisiana Law.*—Under the law of Louisiana, "beyond all question, the primary is a part of the election machinery of the State."[5] Its function is not confined to the designation of party

[4] In *Yarbrough* the interference alleged was the prevention of voting; in *Mosely*, the failure to count votes as cast. In *United States* v. *Buck*, 18 F. Supp. 213 (W. D. Mo.), affirmed *sub. nom. Walker* v. *United States*, 93 F. (2d) 383 (C. C. A. 8th), certiorari denied, 303 U. S. 644, rehearing denied, 303 U. S. 668, the interference was counting and recording ballots in favor of one Congressional candidate which had been cast in favor of another. See also *United States* v. *Pleva*, 66 F. (2d) 529, 530–531 (C. C. A. 2d), *Divilius* v. *United States*, 79 F. (2d) 371 (C. C. A. 3d); *Connelly* v. *United States*, 79 F. (2d) 373 (C. C. A. 3d). Only Section 19 was involved in each of these cases but Sections 19 and 20 may fairly be regarded as identical for this purpose.

[5] *State* v. *Michel*, 121 La. 374, 382, 389.

nominees; it eliminates from candidacy at the general election all those who are defeated in the primary.

All political parties[6] are required by statute to nominate their candidates for the Senate and House of Representatives by direct primary elections, and "the Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of this Act." La. Act No. 46, Section 1, Regular Session, 1940. One who does not seek nomination in a primary may seek office in either of two ways, (a) by filing nomination papers with the requisite number of signatures (La. Act No. 224, Section 50, Regular Session, 1940), or (b) by having his name "written in" at the final election (La. Act No. 224, Section 73, Regular Session). But neither of these possibilities is open to a candidate who has been defeated in a primary. An explicit statute provides:

> No one who participates in the primary election of any political party shall have the right to participate in any primary election of any other political party, with a view of

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[6] "Political party" is defined "to be one that shall have cast at least five per centum of the entire vote cast in the last preceding gubernatorial election, or five per centum of the entire vote cast for presidential electors at the last preceding election, or at either of said elections." La. Act No. 46, Section 3, Regular Session, 1940.

The Louisiana statutes referred to in this discussion are set forth in the Appendix, *infra*, pp. 50–58.

nominating opposing candidates, nor shall he be permitted to sign any nomination papers for any opposing candidate or candidates; nor shall he be permitted to be himself a candidate in opposition to any one nominated at or through a primary election in which he took part.'

That this section prevents a "write in" vote for a candidate defeated at a primary is beyond question in view of the statutory rule that a "write in" vote is ineffective unless the individual voted for

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' La. Act No. 46, Section 87, Regular Session, 1940. For similar "anti-sore head" laws, see Cal. Elections Code (Deering, 1939), § 3001; Colo. Stat. Ann. (1935), c. 59, § 32; Ky. Stat. Ann. (Baldwin's Ed. 1936), § 1550–5a; Md. Ann. Code (Flack, 1939), Art. 33, § 85; Minn. Stat. (Mason, Supp. 1940), § 601–3 (3); Neb. Comp. Stat. (Supp. 1939), § 32–1108; Ohio Code Ann. (Throckmorton, 1940), § 4785–69; Ore. Code Ann. (1930), Tit. 36, § 701; Wyo. Rev. Stat. Ann. (1931), c. 36, § 642. Compare Miss. Code Ann. (1930), § 6231 and (Supp. 1938) § 2030; and see *Ruhr* v. *Cowan*, 146 Miss. 870. In Texas the primary ballots contain a pledge to support the party nominee. Tex. Civ. Stat. (1936), Art. 3110. Similar pledges are required of candidates in North Carolina and Oklahoma (N. C. Code Ann. (1939), § 6022; Okla. Stat. Ann. (1937), Tit. 26, § 162), and of voters in Indiana and Missouri (Ind. Stat. Ann. (Burns, 1933), § 29–510; Mo. Stat. Ann. (1932), § 10269). In Indiana and Oklahoma independent candidates must file their petitions prior to the date of the primary. Ind. Stat. Ann. (Burns, 1933), § 29–1006; Okla. Stat. Ann. (1937), Tit. 26, § 163. See Brooks, *Political Parties and Electoral Problems* (3d ed. 1933), 273; Merriam and Overacker, *Primary Elections* (1928), 130; Sait, *American Parties and Elections* (1939), 475–476; Sargent, *The Law of Primary Elections*, 2 Minn. L. Rev. 97, 192, 201.

has declared his willingness to have his name "written in" before the election.[8] He is thus required "to be himself a candidate", within the meaning of the quoted statute. Nomination as an independent candidate would be barred, apart from the prohibition of candidacy, by the rule that one may not secure a place on the ballot unless his nomination papers are filed with the Secretary of State on or before the date of the primary election. La. Act No. 224, Section 51, Regular Session 1940.

Thus a candidate defeated in the primary is legally precluded from running as an independent

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[8] La. Act No. 160, Section 1 (1932); La. Act No. 224, Section 73, Regular Session, 1940. It is true that in *Lacombe* v. *Laborde*, 132 La. 435 (1913), a blanket provision similar to that set out in the text, *supra*, was held not to prevent the election of a person who had been defeated in a Democratic primary for police juror, when his name was "written in" on a majority of the ballots in the final election. The court drew a distinction between the interest of the individual elected in promoting his candidacy, and the interest of the voters in electing him without solicitation. In the opinion of the court, the statute would have been more explicit had the Legislature intended to deprive the voters of their interest. A similar view was later taken by a lower Louisiana court in *Seal* v. *Knight*, 10 La. App. 563 (Ct. of App., 1st Circuit, 1929). But cf. *Payne* v. *Gentry*, 149 La. 707 (1921). It is reasonable, however, to assume that the enactment, within three years of the *Seal* case (Acts of 1932, No. 160, § 1), of the statutory requirement of a declaration of willingness was an answer to the *Lacombe* and *Seal* decisions. An affirmative act of "candidacy" is now necessary, and the legislative intention to prevent the election of an individual defeated at the primary seems clear.

in the final election, and those who voted for him in the primary have no way of expressing their choice of him in the general election. As a matter of law, then, the Louisiana primary is an integral part of the process of choosing Representatives and the exercise of the constitutional right to choose is dependent upon an opportunity effectively to register a choice at the primary election. If deprived of the right at the primary, the voter loses even the legal possibility of vindicating his choice at the general election.

3. *The Practical Significance of the Primary.*— In the practical exercise of the Louisiana citizen's right to choose his Representative in Congress, the Democratic primary is not only an integral part of the process; it is the determinative part.

This indictment alleges that "since the adoption of the first primary election law by the State of Louisiana in the year 1900, the Democratic nominee for the office of Congressman from the Second Congressional District of Louisiana has been elected" (R. 2, 5). What the demurrer thus admits to be true in the particular case is judicially known to be true generally in a large part of the country. One political party, in those regions, commands the allegiance of an overwhelming majority of the electorate; its candidates are elected invariably, if not perfunctorily (cf. White, C. J., in *Newberry* v. *United States,* 256 U. S. 232, 267) and the real contest occurs in the election by which

its nominees are chosen.[9] Indeed, one of the major reasons for the development of the primary election was that in "the South, where nomination by the dominant party meant election, it was obvious that the will of the electorate would not be expressed at all, unless it was expressed at the primary." Charles Evans Hughes, *The Fate of the Direct Primary,* 10 National Municipal Review 23, 24. Even in those parts of the country where success in the primary is not, as a matter of fact, determinative of success at the general election, defeat in the primary almost invariably spells eventual failure to attain office because of the handicaps assumed in challenging the party organization. As Mr. Justice Pitney said in *Newberry* v. *United States,* 256 U. S. 232, at 286: "As a practical matter, the ultimate choice of the mass of voters

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[9] Statistics compiled in 1927 showed that more than 60% of the members of Congress come from "stand-pat" districts. Based on seven elections from 1914 to 1926, the rate of change in the political affiliation of the successful Congressional candidate was only 1.6% in the South, 12% for the entire country. See Hasbrouck, *Party Government in the House of Representatives* (1927) 172, 176, 177. See also Merriam and Overacker, *Primary Elections* (1928) 267–269.

On the great decrease in the vote cast in the general election from that cast at the primary in the "one-party" areas of the country, see George C. Stoney, *Suffrage in the South,* 29 Survey Graphic 163, 164 (1940). In Louisiana there were 540,370 ballots cast in the 1936 Congressional primaries, as against 329,685 in the general election. In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

is predetermined when the nominations have been made."[10]

As a matter of law, then, the Louisiana primary elections determine the candidates at the general election. As a matter of unbroken practice, the Democratic primary election determines the victor at the general election. Either of these considerations, we believe, demonstrates that the right to choose Representatives, secured by Section 2 of Article I of the Constitution, reaches to the Louisiana primary.

4. *The Process of Choosing Representatives.*— Section 2 of Article I gives to the qualified "People of the several States" the right to choose their Representatives in Congress. Under Section 4 of Article I the machinery by which this right is to be exercised is left to the states and to Congress: the states "shall" prescribe the "Times, Places and Manner of Holding elections for Senators and Representatives" and Congress "may at any time by Law make or alter such Regulations". Pursuant to this authorization, the states and the Congress undoubtedly have wide discretion in the formulation of a practical system to ascertain the will of the electorate. This discretion, of course, permits the conduct of a preliminary contest in which the adherents of political parties may determine which of their number shall be a candi-

[10] See also George W. Norris, *Why I Believe in the Direct Primary*, 106 Ann. Amer. Acad., No. 195, p. 21.

date in the final test of strength. But we insist that the right to choose, secured by the Constitution, is neither lost nor diluted because the state prefers to conduct its electoral process in two steps rather than in one.

The constitutional provision speaks neither of general nor of primary elections. Section 2 of Article I uses the cover-all verb "chosen * * * by the People of the several States". The correlative right which it secures is equally general: it is the right to participate in the choice of Representatives. If the machinery of choice involves two elections, primary and general, rather than one, the right to participate in the choice must include both steps.

This being the case, we think it clear that the right of a qualified person to vote in the Louisiana Congressional primary is an essential part of the constitutionally protected right to choose. The Louisiana primary is conducted by the State at public expense,[11] it is the subject of minute stat-

[11] La. Act No. 46, Section 35, Regular Session, 1940. The cost of the ballots and stationery and other supplies, and the "expenses necessary to the transmission and promulgation of the returns" are met by the state government. The respective parish and municipal units of government bear the necessary expenses "incidental to the holding and conducting" of the primaries, "such as payment of commissioners of election, rent of polling places, expense of delivery of the ballot boxes and supplies to and from the polling places." "Any other actual expenses necessary and incidental to the calling and holding of the said primary election shall be borne by the candidates participating therein."

utory regulation,[12] and it irrevocably eliminates candidates for office who enter the primary but fail to obtain the party nomination.[13] The right to vote in the general election for persons who have participated in a primary is limited to a selection among the candidates whose names are on the ballot; and the range of choice is, therefore, inescapably narrowed by the primary which determines what those names shall be. Thus the primary election under Louisiana law is an integral part of the process of popular choice, and the right of a qualified person to participate in it effectively is protected by the constitutional provision which calls for popular choice. But we do not rest alone on the legal nature of the primary; as a matter of fact, the Democratic primary in Louisiana is decisive of the election of Representatives. Interference with the right to vote in the primary deprives the voter of an opportunity to express a choice at the only stage in the process when the expression is of genuine significance.

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[12] La. Act No. 46, Regular Session, 1940. This act embodies an over-all scheme for the organization of political parties in Louisiana (prescribing their committee structure and the manner in which the members of these committees are to be elected), the form of the primary ballot, the location of polling places, and the hours of voting, the selection and compensation of commissioners, the deposit of the ballots with the state courts, and the mailing of the recorded vote to the Secretary of State, the manner of contesting the results in the state courts, and the punishment of such offenses as bribery and tampering with the votes. Cf. *Grovey* v. *Townsend*, 295 U. S. 45, 50.

[13] See pp. 18–22, *supra*.

We think that Article I, Section 2 is concerned with realities, not with forms; and that it necessarily applies to the decisive phase of the process by which Representatives are chosen. Cf. *United States* v. *Wood,* 299 U. S. 123, 143, and the cases there cited. The Constitution provides an enduring framework of government, not a code of laws applicable only to the procedures of a particular day. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 415. The framers may not have anticipated the primary. But they gave to the qualified electors of the states the right to choose their Representatives in Congress. It is unthinkable that they intended to secure the shadow and not the substance of the right to choose, by leaving unprotected the machinery by which the constitutional choice would in reality be exercised.[14]

Nothing in the history of the Constitution prior to its adoption suggests that the right to choose was envisaged in a limited or artificial sense. The chief source of serious disagreement at the Constitutional Convention, so far as the suffrage was concerned, had to do with the qualifications of voters.

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[14] The difficulty of a purely historical application of Article I, Section 2 is graphically shown by the adoption in Nebraska of the unicameral legislature, rendering strictly inapplicable the constitutional reference to "the most numerous Branch of the State Legislature." The qualifications of the electors of United States Representatives from Nebraska have subsequently been something other than those precisely contemplated by the framers. See Orfield, *The Unicameral Legislature in Nebraska,* 34 Mich. L. Rev. 26.

United States Documents Illustrative of the Union of the American States (1927) 487, 488, 489, 492. It was to avoid any obstacles to ratification which might have arisen from this controversy that the Convention accepted the compromise embodied in Article I, Section 2. Story, *Commentaries on the Constitution of the United States* (Bigelow, 5th ed. 1891). § 584. In the state ratifying conventions the debate shifted to the grant of Congressional power to regulate national elections which is contained in Article I, Section 4. It is true that six states included in their resolutions of ratification the recommendation that a Constitutional amendment be adopted to deny Congressional authority to regulate elections unless the states should refuse to provide for them or should be unable to do so because of invasion or for any other reason.[15] But no such amendment was ever adopted and any lingering doubt as to the unconditional power of Congress to regulate the conduct of national elections was removed in *Ex parte Siebold*, 100 U. S. 371. Clearly neither of these disputes is relevant to the nature and bounds of the constitutionally protected right to choose. Indeed, the word "elected" in a draft of the proposal which became Article I,

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[15] *United States Documents Illustrative of the Union of the American States* (1927): 1018–1019 (Massachusetts); 1023 (South Carolina); 1024–1025 (New Hampshire); 1028, 1033 (Virginia); 1039–1040 (New York); 1056–1057 (Rhode Island). The North Carolina Convention incorporated a similar recommendation in its resolution of August 1, 1788 (*id.* at 1050), but that State did not ratify the Constitution until November 21, 1789 (*id.* at 1051).

Section 2, was eliminated by the Committee of Detail in favor of the seemingly broader word "chosen". 1 Farrand, *Records of the Federal Convention* (1911) 20, 46, 48–50; 2 *id.* 129, 151, 178, 216, 565, 590, 651. Thus, the available historical *indicia* are certainly not incompatible with our view of the scope and implications of the Constitutional right to choose Representatives.

5. *The Gradwell, Newberry, and Grovey Cases.* The District Court thought (R. 20–21) that the analysis advanced above is refuted by the decisions of this Court in *United States* v. *Gradwell,* 243 U. S. 476, and *Newberry* v. *United States,* 256 U. S. 232. We believe that neither of these decisions, nor that in *Grovey* v. *Townsend,* 295 U. S. 45, weakens the view for which we contend.

(a) In the *Gradwell* case it was held that the right of candidates in a Republican Senatorial primary in West Virginia to have only qualified Republican voters cast ballots and to have them vote only once was not protected by the federal Constitution and laws; and that an indictment charging a conspiracy to procure persons to vote illegally for one of the four candidates did not allege a violation of Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51). But whether "in general a primary should be treated as an election within the meaning of the Constitution" was expressly left undecided. The decision was squarely rested upon "some strikingly unusual features of the West Virginia law under which the primary was held" including the

fact "that after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than five per cent. of the entire vote polled at the last preceding election" (243 U. S. 487, 488). Thus the *Gradwell* decision dealt with the rights of candidates and not the rights of voters, and even then turned on a feature of the primary in question which is absent in the present case. The West Virginia primary did not as a matter of law eliminate candidates at the general election; nor are the Republican primaries as a matter of fact decisive of elections in West Virginia.[16]

(b) The *Newberry* case involved the constitutionality of the Federal Corrupt Practices Act of 1910 in so far as it regulated the expenditures of a candidate for Representative or Senator in his campaign for nomination. Four of the Justices thought the statute unconstitutional on the broad

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[16] A Republican candidate, Sutherland, was elected in the 1916 Senatorial contest which was involved in the *Gradwell* case. His predecessor, Chilton, was a Democrat. His colleague, at the time he took office, was Goff, a Republican. In the seven Senatorial elections in West Virginia from 1919, when Goff's term expired, to 1937, the Democratic candidate was elected four times, the Republican three. Cong. Directory: 65th Cong., 1st Sess., 1st ed. 1917, p. 119; 64th Cong., 2d Sess., 2d ed. 1917, p. 118; 65th Cong., 1st Sess., 1st ed. 1917, p. 118; 66th Cong., 1st Sess., July, 1919, p. 122; 68th Cong., 1st Sess., 1st ed. 1923, p. 120; 69th Cong., 1st Sess., 1st ed. 1925, p. 125; 71st Cong., 1st Sess., 1st ed. 1929, p. 124; 72d Cong., 1st Sess., 1st ed. 1931, p. 122; 74th Cong., 1st Sess., 1st ed. 1934, p. 124; 76th Cong., 1st Sess., 1st ed. 1939, p. 124.

ground stated in the opinion of Mr. Justice McReynolds that the power of Congress under Article I, Section 4, "to make or alter" regulations as to the times, places, and manner of holding elections for Senators and Representatives did not extend to the regulation of party primaries. Chief Justice White, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke, though they agreed that the conviction should be reversed for errors in the charge, held that the primary is an election within the meaning of the express grant of Congressional power; and that, even if it is not, Congress was authorized to conclude that the regulation of primary campaigns for federal offices was necessary and proper to safeguard the representative government for which the Constitution provides. On the issue of constitutionality Mr. Justice McKenna thus cast the decisive vote. He concurred in the opinion of Mr. Justice McReynolds "as applied to the statute under consideration which was enacted prior to the Seventeenth Amendment,"[17] but he specifically reserved "the question of the power of Congress under that Amendment" (256 U. S. at 258).

[17] The opinion of Mr. Justice McReynolds observed that the statute "antedates the Seventeenth Amendment and must be tested by powers possessed at the time of its enactment" and that a "concession that the Seventeenth Amendment might be applicable in this controversy if assisted by appropriate legislation would be unimportant since there is none" (256 U. S. at 254–255). But the opinion as a whole does not limit the conclusion stated to the situation prior to the Amendment.

Thus a majority of the Court accepted the view that a primary is not a part of the election of Senators, within the meaning of Article I, Section 4, only so long as the choice of Senators was vested in the state legislatures by the Constitution; and even then four of the Justices took the contrary view.

We think the reasoning of the minority of the Court in the *Newberry* case is correct: "Election," within the meaning of Article I, Section 4, includes such preliminary steps in the process as the primary. If this were not so, neither the United States nor the states would have authority to regulate primaries for federal offices. Their power over this federal function, in the same manner and to the same degree as that of Congress, is derived from Article I, Section 4; this is not one of the powers reserved to them by the Tenth Amendment.[18] And, in any event, under Article I, Section 8, the regulation of primaries is within the power of Congress

[18] "If the preliminary processes of such an election are to be treated as something so separate from the final choice that they are not within the power of Congress under this provision, they are for the same reason not within the power of the States, and, if there is no other grant of power, they must perforce remain wholly unregulated. * * * For the election of Senators and Representatives in Congress is a federal function; whatever the States do in the matter they do under authority derived from the Constitution of the United States. The reservation contained in the Tenth Amendment cannot properly operate upon this subject in favor of the state governments * * *." (Mr. Justice Pitney in *Newberry* v. *United States*, 256 U. S. 232, at 280-281.)

to devise measures which are necessary and proper to safeguard the final election and the institution of representative government.[19]

But even if these views of the minority were rejected, we think it clear that the decision of the majority of the Court was no determination of the status of a Congressional primary—or even of a Senatorial primary since the adoption of the Seventeenth Amendment. The Court did not have before it the question of whether a primary is an integral part either of a *Congressional* election, within the meaning of Article I, Section 4, or of the process by which Representatives are chosen by the *people,* within the meaning of Article I, Section 2. Moreover, the primary involved in the *Newberry* case differed from the Louisiana primary in the same way as did the West Virginia primary involved in the *Gradwell* case. Newberry's brief in this Court emphasized the point that "Electors are free to go to the polls and cast their votes for anyone they please and the election would be complete

[19] In *Burroughs and Cannon* v. *United States*, 290 U. S. 534, this Court sustained the power of Congress to regulate by the Corrupt Practices Act of 1925 the expenditures of national committees for the purpose of influencing the selection of Presidential electors in two or more states. But the selection of Presidential electors is, in form at least, only a prelude to the election of the President and Vice President. Indeed, in *Walker* v. *United States*, 93 F. (2d) 383, 389 (C. C. A. 8th), certiorari denied, 303 U. S. 644, rehearing denied, 303 U. S. 668, it was held that Section 19 is inapplicable to the alteration of ballots for presidential electors, on the ground that they "are officers of the state and not federal officers."

without any 'nominations' " (*Newberry* v. *United States,* No. 559, October Term, 1920, Brief for Plaintiffs in Error, p. 54). In Louisiana, as we have said, electors are not "free to cast their votes for anyone they please"; candidates eliminated at the primary are eliminated once and for all. Finally, it may be observed that the issue in the *Newberry* case was the power of Congress to regulate the campaign for nomination, and not the source of the right to vote for members of the House of Representatives in the primary itself. The denial of Congressional power over the campaign preceding the primary would not necessarily involve a denial that the right to vote in the primary is a part of the process of popular choice; and it is for that reason that we contend that the right is secured by Article I, Section 2.

(c) The present problem is unaffected by the decision of this Court in *Grovey* v. *Townsend,* 295 U. S. 45. It is true that in that case the rule of the Democratic party excluding negroes was held not to infringe rights secured by the Constitution of the United States. But it was not true in Texas as it is in Louisiana that the state had made the primary a part of the electoral process.[20] Moreover, what Article I, Section 2 secures is the right to choose. The implicit premise of the *Grovey* decision is that the negroes excluded from the Democratic primary were legally free to record

[20] See p. 18, note 22, and pp. 25, 26, notes 11, 12, *supra.*

their choice by joining an opposition party or by organizing themselves. In the present case the voters exercised the right to choose in accordance with the contemplated method; and the wrong alleged deprived them of an opportunity to express their choice in any other way.

6. *The Congressional Practice.*—That Congress regards the primary as an integral part of the process of election is demonstrated not only by the enactment of the statute involved in the *Newberry* case but, more significantly, by the fact that both before and after the *Newberry* decision, it has inquired into frauds at primaries as well as at the general elections in judging the "Elections, Returns and Qualifications of its own Members" under Article I, Section 5.[21]

In none of the cases decided after *Newberry* v. *United States* has Congress doubted its jurisdiction to investigate and determine the existence of frauds in primaries. The Senate continued, after the decision, to consider Henry Ford's challenge to Senator Newberry's seat and inquired into Newberry's conduct in the primary election. See S. Rep. No. 277, 67th Cong., 1st Sess. Based upon that conduct, a minority report, submitted by Sen-

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[21] *Grace* v. *Whaley*, H. Rep. No. 158, 63d Cong., 2d Sess.; *Peddy* v. *Mayfield*, S. Rep. No. 973, 68th Cong., 2d Sess.; *Wilson* v. *Vare*, S. Rep. No. 1858, 70th Cong., 2d Sess., S. Rep. No. 47, 71st Cong., 2d Sess., and S. Res. 111, 71st Cong., 2d Sess. Cf. opinion of Mr. Justice McReynolds in *Newberry* v. *United States*, 256 U. S. 232, 258; and the opinion of Mr. Justice Pitney, 256 U. S. at 284–285.

ators Pomerene, King, and Ashurst, recommended that Newberry should not be seated. Moreover, in February, 1923, the Law Committee of the National Republican Congressional Committee reported to Congress its belief that despite the *Newberry* decision, the Corrupt Practices Act was still in force as to Representatives and that candidates were required to file sworn statements of campaign expenditures in primaries (64 Cong. Rec. 4567, 67th Cong., 4th Sess.). In conformity with this theory, candidates for Congress continued to file reports of expenditures until the repeal of the Corrupt Practices Act in 1925. Cannon's *Precedents of the House of Representatives* (1936), Sec. 69.

Congressional practice has weight in determining the meaning of constitutional provisions. But it is especially significant where the practice involves a Congressional interpretation of the Constitution in a field in which Congress has an autonomous power. *Cf. Smiley* v. *Holm*, 285 U. S. 355, 369; see also Mr. Justice Pitney in *Newberry* v. *United States*, 256 U. S. 232, 284–285.

II

VOTERS IN A PRIMARY ELECTION ARE DENIED THE EQUAL PROTECTION OF THE LAWS BY STATE OFFICERS WHO REFUSE TO COUNT THEIR VOTES AS CAST AND COUNT THEM IN FAVOR OF AN OPPOSING CANDIDATE

Even if the right of a qualified person to have his vote in the Louisiana Congressional primary

counted as cast is not secured and protected by Article I, Section 2, we think the voter is protected by the Fourteenth Amendment against the injury and deprivation alleged in the indictment.

In receiving and counting ballots and certifying the results of the primary election, the Commissioners of Election are state officers exercising state power in connection with a function which the state has assumed to conduct.[22] Their action under color of their office, even though contrary to state law, constitutes state action within the meaning of the Fourteenth Amendment. The point was settled as long ago as *Ex parte Virginia,* 100 U. S. 339, 347, that whoever "by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the state." See also *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245–246; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 343; *Mosher* v. *City of Phoenix,* 287 U. S. 29; *Chicago, Burlington Ry.* v. *Chicago,* 166 U. S. 226, 233–234.

It is also clear that Congress may make criminal the acts of state officials which effect a denial of

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[22] The method of their selection is prescribed by statute and their compensation is provided by the local units of the state government. Act No. 46, Sections 35 and 61, Regular Session, 1940. See also notes 11, 12, *supra,* pp. 25, 26.

equal protection (*Ex parte Virginia, supra,* 100 U. S. at 348; *Guinn* v. *United States,* 238 U. S. 347; and cf. *Nixon* v. *Herndon,* 273 U. S. 536), and that the equal protection clause prohibits unjustifiable discrimination by the state with respect to voting at primary elections (*Nixon* v. *Herndon, supra; Nixon* v. *Condon,* 286 U. S. 73).

In the light of these settled principles, we think it plain that state officials in charge of a primary election who wilfully alter the ballots cast for two of the candidates and count them as cast for the third, deprive the voters whose ballots are thus nullified of the equal protection of the laws. They are discriminatorily denied the right to have their choice recorded, by reason of the nature of the choice they have made. No argument is needed to show that a state statute which provided for such discrimination in the counting of ballots would be a denial of equal protection. The discrimination is no less forbidden where it is wilfully practiced by administrative officers clothed with the power of the state. The Election Commissioners are in no different position than was the judge selecting jurors in *Ex parte Virginia* or the tax collector in *Iowa-Des Moines Bank* v. *Bennett.*

It is obviously without significance that the arbitrary discrimination was not based upon race or color (cf. *United States* v. *Reese,* 92 U. S. 214), for the day is long past when such discriminations measure the scope of the equal protection clause

(*Iowa-Des Moines Bank* v. *Bennett, supra; Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison,* 301 U. S. 459; cf. *Buchanan* v. *Warley,* 245 U. S. 60, 76).

It is equally immaterial that the arbitrary discrimination was practiced on the single occasion alleged; the denial of equality need not be habitual (cf. *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 161; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351). While in cases involving administrative inequalities, the unjustifiable discrimination which deprives of equal protection has been characterized as "systematic" (see *e. g. Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245) or "adopted as a practice" (*Chicago G. W. Ry.* v. *Kendall,* 266 U. S. 94, 99), we take this to mean that the inequality must be produced by conscious and deliberate discrimination, not that it must be repetitious. The inadvertent inequalities produced by state officials in the administration of state laws are inherent in the legal process and, however unjustifiable, do not deprive of equal protection (cf. *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 25). But when inequality is designedly produced by state officials in the exercise of state administrative power, the discrimination must meet the same constitutional test as a statute by which the particular inequality is articulately ordained.

It is of no consequence that the indictment does not count in terms upon the Fourteenth Amendment and the right of the voters to equal protection of the laws. The charge is laid in the language of the statute and specifies as the right "secured" and "protected" by the Constitution the right of the voters whose ballots were altered to have their votes counted as cast. If, as we contend, the infringement of that right by the alleged acts of the defendants constitutes a denial of equal protection, it seems clear that the District Court erred in holding that the right is not "secured" and "protected" by the Constitution of the United States.

III

SECTIONS 19 AND 20 OF THE CRIMINAL CODE ARE OTHERWISE APPLICABLE TO THE ACTS ALLEGED IN THE INDICTMENT

We have shown that the right of the voters to have their votes counted as cast is "secured" and "protected" by the Constitution of the United States. The remaining question is whether Sections 19 and 20 of the Criminal Code are otherwise applicable to the acts alleged in the indictment. We contend that they are.

1. *The Generality of the Statutory Words.*—The District Court emphasized the fact that primary elections were not in existence in 1870 when Sections 19 and 20 were first enacted. It concluded, quoting *United States* v. *Gradwell,* 243

U. S. 476, 488–489, that the application of the statute would result in "stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

But the statute is addressed in "sweeping general words" to conspiracies against and deprivations of federal rights. *United States* v. *Mosley*, 238 U. S. 383, 387–388. Section 19 has been applied in the past to rights as diverse as the right to inform of a federal crime (*In re Quarles and Butler, Petitioners*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458) to be secure in federal custody (*Logan* v. *United States*, 144 U. S. 263), to stand by a federal homestead (*United States* v. *Waddell*, 112 U. S. 76), to vote for a member of the House of Representatives (*United States* v. *Mosley*, 238 U. S. 383) and, where the denial violates the Fifteenth Amendment, to vote for state officers (*Guinn* v. *United States*, 238 U. S. 347). The only general limitation on the scope of the statute recognized by this Court is that the federal right be "definite" and "personal" as distinguished from a right "common to all that the public shall be protected against harmful acts" (*United States* v. *Bathgate*, 246 U. S. 220, 226). The "definite" and "personal" character of the right to vote has, however, been most emphatically upheld (*United States* v. *Mosley, supra*; see *United States* v. *Bathgate*, 246 U. S. at 227; cf. *Nixon* v. *Herndon*, 273 U. S. 536; and the opinion of Mr. Justice Frank-

furter in *Coleman* v. *Miller,* 307 U. S. 433, 460, at 469).

Accordingly, we think the fact that primary elections were unknown in 1870 is without significance. The applicable principle was recently stated by this Court: "Old crimes * * * may be committed under new conditions * * *. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope" (*Browder* v. *United States,* No. 287, present Term, p. 4). See also *Hague* v. *C. I. O.,* 307 U. S. 496, especially the opinion of Mr. Justice Stone at pp. 526–527. It is no more material that primary elections were unknown when the statute was passed than it would be that a city ordinance which worked a deprivation of federal rights was enacted after 1870 or, indeed, that the city which enacted the ordinance was not established until after that time. Nor is there significance in the fact that in 1894 Congress repealed the companion provisions of the statute dealing with specific irregularities in elections. *United States* v. *Mosley, supra,* definitely held that the repeal did not place the right to vote outside of the general protection which the statute "most reasonably affords." See also *Nixon* v. *Herndon,* 273 U. S. 536.

In short, Sections 19 and 20 of the Criminal Code protect generally the exercise of rights secured or

protected by the Constitution, whether the particular occasion for their exercise or the method by which they are infringed existed in 1870 or not.

2. *Section 19 is Applicable to the Denial of Equal Protection by State Officers.*—The first count of the indictment rests upon Section 19 of the Criminal Code (U. S. C., Title 18, Section 51), which is in terms applicable to the acts of individuals. It may be argued that the first count cannot be sustained, therefore, solely on the basis of the theory that the voters were deprived of rights secured by the Fourteenth Amendment, since the Amendment applies only to the acts of state officers. The District Court did not place this interpretation upon Section 19, but the issue is doubtless open on this appeal. *United States* v. *Gilliland,* No. 245, decided February 3, 1941.

One Circuit Court of Appeals has held that Section 19 is inapplicable to a conspiracy by election officials to deprive negroes of the right to vote at a state election on the ground that the statute is not confined to cases of state action and consequently is not "appropriate" legislation to enforce a constitutional limitation on state action alone. *Karem* v. *United States,* 121 Fed. 250 (C. C. A. 6th); cf. *United States* v. *Reese,* 92 U. S. 214. We find no basis for this interpretation in the language of the statute or in its legislative history.[23] The prohibi-

[23] See 91 Cong. Globe 3611–3612, 3679; Flack, *The Adoption of the Fourteenth Amendment* (1908), 219 *et seq.*

tion of a conspiracy to injure a citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution" of the United States includes a conspiracy by persons to use state power to injure rights which are safeguarded against state action. Nothing in the enabling clause of the Fourteenth Amendment suggests that legislation is not "appropriate" to enforce the Amendment if it deals not only with rights guaranteed by the Amendment against state action but, also with rights protected by other constitutional provisions against individual action as well.

The point, in any event, was necessarily settled *sub silentio* in *Guinn* v. *United States,* 238 U. S. 347, 368, which sustained the applicability of Section 19 of the Criminal Code to state election officials who conspired to deprive negroes of rights guaranteed by the Fifteenth Amendment, which, of course, is also directed against state action alone.

3. *The Alleged Acts of the Defendants Were Done Under "Color of Law," Within the Meaning of Section 20.*—Section 20 protects "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" against willful deprivation "under color of any law, statute, ordinance, regulation, or custom". It was

enacted initially to enforce the Fourteenth Amendment.[24] We see no reason why it should be held to have a narrower scope than the Amendment itself. Accordingly, we think that any conduct which would constitute "state action," within the meaning of the Amendment, is action "under color of law," within the meaning of the statute; that "color of authority" and "color of law" are equivalent terms. That the alleged conduct of the defendants was state action for purposes of the Amendment has already been demonstrated (*supra*, pp. 36–40). In two of the four cases in which, so far as we know, Section 20 has been invoked, it has been held that the acts of the officials alleged were performed "under color of law, statute, ordinance, regulation, or custom" even though they were contrary to the laws of the state.[25] Section 20 does not require

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[24] 89 Cong. Globe 1536; 91 Cong. Globe 3480, 3658, 3690; 92 Cong. Globe 3807–3808, 3879; Flack, *The Adoption of the Fourteenth Amendment* (1908), 219, 223.

[25] *United States* v. *Sutherland* (N. D. Ga.), demurrer to indictment overruled, July 31, 1940 (unreported) (police officer extorting confession by torture); *United States* v. *Cowan* (E. D. La.), demurrer to indictment overruled, August 14, 1940 (unreported) (police officer assaulting person taking photographs of proceedings at a polling place). See Report of the Attorney General (1940), 77. See also *United States* v. *Buntin*, 10 Fed. 730 (C. C. S. D. Ohio), and *United States* v. *Stone*, 188 Fed. 836 (D. Md.). And compare *Hague* v. *Committee for Industrial Organization*, 101 F. (2d) 774, 781, 788, 789, 790 (C. C. A. 3d), affirmed, 307 U. S. 496, where the same conclusion was reached with respect to similarly worded statutes.

that the defendant's conduct be sanctioned by a particular law or statute; it is enough that his acts are done in reliance upon his official power. In the present case, on the facts alleged, the defendants acted in reliance upon their official position in conducting the election, counting the votes, and certifying the returns. Moreover, the statute applies only to willful violations. Where action is based upon the express mandate of state law, it might be exceedingly difficult to establish willfulness against a defense of mistake of law. If the statute were limited to such cases, it would, therefore, have only the most trivial scope. We see no justification for thus limiting the ambit of a statute which, on its face, is designed to confer broad protection upon the enjoyment of federal rights. Cf. Holmes, J., in *United States* v. *Mosley*, 238 U. S. 383, 388.

4. *Section 20 is not Limited to Deprivations on account of Race, Color, or Alienage.*—That Section 20 is not limited to the deprivation of federal rights on account of color or race is demonstrable as a matter of grammar. The statute [20] can be sensibly

[20] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

construed only as forbidding the subjection of inhabitants (1) "to the depriviation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"; or (2) "to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens". The reference to color and race is limited to the prohibition of "different punishments, pains, or penalties," as the final words of the clause make clear. To read "than are prescribed for the punishment of citizens" as a part of the initial prohibition of deprivation of federal rights, would render Section 20 nonsensical. This can be avoided only by reading the latter part of the section, relating to punishments, as independent of the former, relating to federal rights.[27]

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court's construction of Sections 19 and 20 of the Criminal Code was erroneous; that the first and second counts of the indictment allege violations of the statutes; and that the judgment sustaining the demurrer should be re-

[27] On demurrer to the indictment in *United States* v. *Cowan*, *supra*, p. 45, note 25, this objection was raised and the interpretation which we urge was sustained.

versed and the cause remanded for further proceedings.

FRANCIS BIDDLE,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
WARNER W. GARDNER,
HERBERT WECHSLER,
Special Assistants to the Attorney General.
JAMES E. DOYLE,
ALFRED B. TETON,
Attorneys.

MARCH 1941.

APPENDIX

The Constitution of the United States:

> Article I, Section 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."
>
> * * * * *
>
> Article I, Section 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."
>
> * * * * *
>
> Amendment XIV: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51):

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise

on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States. (R. S. § 5508; Mar. 4, 1909, c. 321, § 19, 35 Stat. 1092.)

Section 20 of the Criminal Code (U. S. C., Title 18, Sec. 52):

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (R. S. § 5510; Mar. 4, 1909, c. 321, § 20, 35 Stat. 1092.)

La. Act No. 46, Regular Session, 1940:

> SECTION 1. Be it enacted by the Legislature of Louisiana, that all political parties shall make all nominations of candidates for the United States Senate, Members of the House of Representatives in the Congress of the United States, all State, district, parochial and ward officers, Members of the Senate and House of Representatives of the State of Louisiana, and all city and ward

officers in all cities containing more than five thousand population, by direct primary elections.

That any nomination by any political party of any person for any of the aforesaid mentioned offices by any other method shall be illegal, and the Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of this Act.

* * * * *

SECTION 3. The term "political party," as used in this Act, is defined to be one that shall have cast at least five per centum of the entire vote cast in the last preceding gubernatorial election, or five per centum of the entire vote cast for presidential electors at the last preceding election, or at either of said elections.

SECTION 4. All primary elections held by political parties, as defined herein, must be conducted and held under, and in compliance with, the provisions of this Act.

[Section 5 provides that all political parties shall be directed by an organization of committees which are described and specified in detail. Among these committees is the Parish Committee for each parish in the state, which committee is to be "composed of as many ward members as there are police jurors provided for in such parish and five (5) members at large, all of which members shall be elected in the same manner as members of the State Central Committee; provided, however, that in the Parish of Orleans said parish committee shall consist of two (2) members from each ward in said parish."]

* * * * *

SECTION 15. The members of the Parish Executive Committee, as herein provided, shall be elected at the first primary election held in January, 1944,[1] for the nomination of State and parish officers, and shall be elected every four years thereafter. * * *.

* * * * *

SECTION 19. The State Central Committee, as now organized and created, and all other committees, as now organized and created, and all officers of the various committees heretofore created and now in existence, are hereby recognized and continued. All rules, regulations and requirements heretofore adopted by the State Central Committee or by any of the committees organized under Act 97 of the Legislature of Louisiana for the year 1922, as amended, not in conflict with or contrary to the provisions of this Act, are hereby recognized as legal and valid, and shall continue in full force and effect until otherwise changed by the committees herein created, or authorized to be created.

* * * * *

SECTION 27. The qualifications of voters and candidates in primary elections, held under this Act, shall be the same as now required by the Constitution and election laws of this State for voters at general elections and the further qualifications prescribed by the State Central Committee of the respective political parties coming under the provisions of this Act.

* * * * *

SECTION 29. Only those who have so declared their political affiliation shall be permitted to become candidates or to vote in any primary election of any political party, as defined in this Act.

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[1] See note 2, *infra*, p. 56.

SECTION. 30. Any person desiring to become a candidate in any primary election held under the provisions of this Act shall, within twenty days for State and District officers, and within ten days for parochial, municipal and ward officers, except as otherwise provided herein, from and after the issuance of the call of the said committee for the said primary election, file with the respective officers hereinafter designated, written notification of his intention to become a candidate at such primary, accompanied by a declaration, under oath, that to the best of his knowledge and belief he is a duly qualified elector under the Constitution and laws of this State; that he is a member of the party calling said primary election, and that he possess the qualifications required by the State Central Committee of such party.

SECTION 31. (a) Every candidate for nomination as United States Senator, member of Congress * * * shall file written notification and declaration of candidacy, as provided herein, with the Chairman of the committee calling the primary, and as evidence of their good faith, shall, at the time of filing such notice and declaration of candidacy, deposit with the Chairman of the committee calling the primary election, the sum of One Hundred and No/100 ($100.00) dollars.

* * * * *

SECTION 35. The expense of primary elections held under this Act shall be apportioned and defrayed as follows:

(a) The expense of printing ballots and the furnishing of the necessary stationery and other election supplies for all primary elections held under the provisions of this Act, except as hereinafter otherwise provided, and also all expenses necessary to the

transmission and promulgation of the returns, shall be paid by the State of Louisiana, in the same manner as for general elections.

(b) The necessary expenses incidental to the holding and conducting of the said primary elections, such as payment of commissioners of election, rent of polling places, expense of delivery of the ballot boxes and supplies to and from the polling places, shall be borne by the respective parishes, cities and towns, and the respective police juries, or municipal authorities shall provide, by ordinance, for their payment.

(c) Any other actual expenses necessary and incidental to the calling and holding of the said primary election shall be borne by the candidates participating therein.

[Sections 36–39 provide that the ballot in Congressional primaries shall be prepared by the Secretary of State and shall be printed according to a specified form. Section 38 provides:

"At the bottom of the ballot and after the name of the last candidate shall be printed the following, viz.: 'By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.'

"Should any voter scratch out, deface or in any way mutilate or change the pledge printed on the ballot, he shall not be considered or held to have repudiated or to have refused to take the pledge, but shall, conclusively, be presumed and held to have scratched out, defaced or mutilated or changed same for the sole purpose of identifying his ballot; and accordingly such ballot shall be marked 'Spoiled Ballot' and shall not be counted."]

* * * * *

[Sections 53–57 specify the location of the polling places and the hours during which they must be open.]

SECTION 58. No voter shall be allowed to take part in any primary who shall not have registered at least thirty (30) days prior to the date of the primary election held under this Act. Seven days prior to every primary election, the Registrar of Voters throughout the entire State shall make a complete list of all registered voters in every voting precinct in the parish registered as affiliated with the party holding the primary, certify to same, and at least five (5) days before the primary election deliver the same to the respective parish committees of the party or parties holding the said primary election, without any cost or charge whatsoever. The said list shall not contain the name of any elector not affiliated with the party holding the said primary election. * * *

* * * * *

[Section 61 provides that primaries are to be conducted by five commissioners of election at each polling precinct, who shall be commissioned in each parish by the chairman or the vice-chairman of each parish committee. They are to possess "the same qualifications as are required of voters in the ward in which they shall reside." Their compensation is to be $5. They are to be selected in this fashion: the "local" candidates in each parish in the state submit a given number of names of persons whom they desire to be commissioned, and the names of five of these persons are chosen by lot. (In Section 34, "local candidates" are

defined as: "(a) candidates for membership in either house of the Legislature of Louisiana, (b) candidates for any parish, ward or municipal office, except those of Justice of the Peace or Constable.") This drawing of names is to be conducted by the parish committee.[2]]

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[2] Presumably the "parish committee" mentioned in this section is the "parish committee" whose formation is regulated by Section 15 of this Act No. 46, *supra*. However, Section 15 provides that the members of this parish committee are to be elected "at the first primary election held in January, 1944". Consequently, the selection of election commissioners at the election involved in this case must have been under Sections 2675 and 2678 of La. Gen. Stat. Ann. (Dart, 1939). Section 2678 declares:

"The state central committee and all other subordinate or local committees of all the political parties coming within the provisions of this act, as now constituted (except the present chairmen of the state central committees) are hereby recognized as the legal committees and the governing authorities of the said political parties.

"The members thereof shall hold their offices as members of the said committees for the term for which they have been already elected. They are authorized to make any rules and regulations for their government not in conflict with any provisions of this act. The state central committees of all political parties, as now constituted, shall direct and order the manner in which all subordinate or local committees shall be organized and constituted, fix their number, regulate their term of office, the time of their election, provided same shall not be for a longer term than four years; provided, however, that the members of all committees shall be elected in a direct primary except as is herein provided for the election of committeemen at large, and, except where a vacancy occurs in the membership of any committee for any cause, in which event the committee on which the vacancy

SECTION 87. No one who participates in the primary election of any political party shall have the right to participate in any primary election of any other political party, with a view of nominating opposing candidates, nor shall he be permitted to sign any nomination papers for any opposing candidate or candidates; nor shall he be permitted to be himself a candidate in opposition to any one nominated at or through a primary election in which he took part.

La. Act No. 224, Regular Session, 1940:

SECTION 48. That all nominations by political parties recognized by law shall be as provided in the primary election laws as now existing, or as may hereafter be passed excepting only presidential electors, who shall be chosen and nominated in any manner determined by a resolution of the State Central Committee of the respective political parties.

* * * * *

SECTION 73. * * *. If he [the voter] desires to vote for a person other than a nominee of political parties, he must write in his own handwriting the name of such person in the space provided for such purpose, with a pencil having black lead, and stamp with the official stamp the white square in the voting space at the right of the name so written.

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occurs shall have the authority to fill same, except the state central committeemen at large."

Section 2675 provides that election commissioners shall be chosen by the parish committee in virtually the same manner as that described in § 61 of Act No. 46. By the terms of La. Gen. Stat. Ann. (Dart, 1939) §§ 2675 and 2721, the commissioners receive from the state treasury three dollars for each day's active service.

Provided that no person whose name is not authorized to be printed on the official ballot, as the nominee of a political party or as an independent candidate, shall be considered a candidate for any office unless he shall have filed with the Clerks of the District Court of the parish or parishes in which such election is to be held, or the Clerk of the Civil District Court of the Parish of Orleans if he be a resident of the Parish of Orleans, at least ten (10) days before the general election, a statement containing the correct name under which he is to be voted for and containing the further statement that he is willing and consents to be voted for for that office, and provided further that no commissioners of elections shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 618

THE UNITED STATES OF AMERICA,

Appellant,

versus

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, and J. J. FLEDDERMANN,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF OF DEFENDANTS AND APPELLEES.

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants and Appellees.

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IN THE

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October Term, 1940.

No. 613.

THE UNITED STATES OF AMERICA,
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PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, and J. J. FLEDDERMANN,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF OF DEFENDANTS AND APPELLEES.

OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Louisiana (R. 18) is reported in 35 Fed. Supp. 66.

STATUTES INVOLVED.

Section 51. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined, etc. (R. S. Sec. 5508; Mar. 4, 1909, c. 321, Sec. 19, 35 Stat. 1092.)"

Section 52. "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant, of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined", etc. (R. S. Sec. 5510; Mar. 4, 1909, c. 321 Sec. 20, 35 Stat. 1092.)

QUESTIONS PRESENTED.

Point 1. Will the Court pass on the constitutional validity of an act of Congress where that is not necessary to a decision of the case?

Point 2. Where the crime charged consists of several conspiracies charged in one count, will that count be upheld where the government announces that it is not seeking to sustain part of the count?

Point 3. Since defendants were acting as officials of a political party, and were not state officers, could they

have violated section 52, which required that they act under color of a law, etc.?

Point 4. Does the indictment charge a federal offense, under Sections 51 and 52, when it alleges the deprivation of a right, privilege or immunity secured or protected by the Constitution or laws of the United States relating to a party nominating primary, and not a general election?

STATEMENT.

This is an appeal by the United States from a judgment sustaining a demurrer to a bill of indictment charging the violation of Sections 51 and 52, Title 18, U. S. C. A. (Criminal Code Sections 19 and 20).

Only Counts 1 and 2 are before the court for decision. The appellant has not appealed from the judgment dismissing Counts 3 and 4. Counts 5 and 6 have to do with the mail fraud statute, and are not before the court as the demurrer was overruled as to those two counts.

It is alleged that the defendants, while acting as commissioners in a primary, fraudulently counted, altered and returned votes in connection with a party nomination of a candidate for the United States House of Representatives, thereby depriving not only the voters, but also the candidates of their rights and privileges under the Constitution and laws of the United States.

SUMMARY OF ARGUMENT.

Point 1. The Supreme Court will not rule upon the constitutionality of an act of Congress, unless such a ruling is necessary for a decision of the case.

Point 2. Appellant has no right to change the nature of the crime charged by an attempt to omit part of a count of an indictment found by a Grand Jury.

Two conspiracies are charged in Count one of the indictment. That count alleges that the defendants did deprive citizens and candidates, of certain rights and privileges involving the elective franchise, to-wit: (1) The citizens' rights to cast their votes for the candidate of their choice, and to have their votes counted as cast; (2) The rights of the unsuccessful candidates, in and to such votes that were cast for them by the voters.

While this court has held that Sec. 51, Title 18, U. S. C. is applicable to conspiracies against the elective franchise insofar as general elections are concerned, those decisions fall far short of making the section applicable to the conduct of a state nominating primary, and do not advance us far toward the claimed conclusion that illegal voting for *one candidate* at such a primary so violates a right secured to the other candidate by the United States Constitution and laws as to constitute an offense within the meaning and purpose of the section.

Where two conspiracies are charged in one count this constitutes but one crime. The appellant concedes that it is not attempting to sustain the validity of one of the con-

spiracies so charged in the count. Therefore, the count of the indictment not being severable without garbling the charge found by the Grand Jury, the demurrer was properly sustained as to that count without regard to the constitutional question of whether the federal courts have jurisdiction in cases involving primary elections.

Point 3. The second count charges that the defendants in acting as election officials (commissioners) acted under color of state law, to-wit: Act 46 of 1940; but that act provides against party officials being considered officers or employees of the state. Therefore, Sec. 52 has no application to them, as they are merely party officers without regard to the Constitutional question of whether the federal courts have jurisdiction in cases involving primary elections.

The fact that a political party, and its manner of selecting its nominee through a nominating primary, is regulated by state law does not mean that they are creatures of the state.

Point 4. There is no provision of the Constitution or laws of the United States by which such right or privilege of a member of such political party is secured to him.

A nominating primary is in no sense an election within the intendment of Sec. 4 of Art. I of the Constitution of the United States.

ARGUMENT.

POINT 1.

When Will Court Pass On Constitutionality Of Act Of Congress?

This case is presented by appellant in its brief as though the sole question at issue is the application *vel non* of Sections 51 and 52, Title 18, U. S. C. (Sections 19 and 20 of the Criminal Code) to a party nominating primary.

There are substantial questions, arising under the demurrer to the indictment, which should be determined before the serious and far-reaching constitutional question involving the jurisdiction of the federal courts over party nominating primaries is considered.

We understand that it is a well-recognized rule that this court will not pass upon the constitutional validity of an act of Congress unless such a determination is essential to a proper decision of the case.[1]

We do contend that the application which the appellant seeks to make of Sections 51 and 52 in this case is unconstitutional. The Federal Government has no power, either express or implied, to regulate the affairs of political

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[1] Cooley on Constitutional Law, Bruce's Fourth Edition, Page 192, (1931) Ch. XV.

See United States v. Blair, 250 U. S. 273, where the Court said (pp. 278-279):

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an Act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."

parties, or their manner of selecting, or nominating the persons they propose to support at an ensuing election. However, this is an alternative argument that need not be decided unless it is found that our contentions, that the two counts appealed herein do not charge an offense cognizable under federal laws, are without merit.

POINT 2.

Count Charging Two Conspiracies Not Severable, If One Conspiracy Invalid Whole Count Falls.

The government has not appealed from the judgment sustaining the demurrer to Counts 3 and 4 of the indictment. Those counts charge that the defendants did subject, and cause to be subjected, the two unsuccessful candidates for the Democratic primary, who were candidates for nomination for Congress, to the deprivation of their rights and privileges and immunities protected by the Constitution and laws of the United States, such voters having been deprived of the right to vote for the candidates of their choice, and each of the two unsuccessful candidates having been deprived of his rights, privileges and immunities to offer himself as a candidate to be legally and properly nominated as a candidate and have counted for him all votes legally cast for him, for said nomination for said office.

Undoubtedly appellant failed to appeal on those two counts because it could not reasonably contend that the Constitution and laws of the United States protected the

candidates to the rights to any votes cast. On the contrary, such civil rights cases as the *Mosley* and *Yarbrough* cases have never gone further than to hold that it is the individual voter whose right to vote and have his vote counted as cast that is protected.

Appellant's appeal, however, covers Count 1. That count, like Counts 3 and 4, charges not only a conspiracy to injure citizens and voters in the free exercise and enjoyment of the right and privilege secured by the Constitution and laws of the United States to vote and have their votes counted, but it also charges,

> (R-2) "That it was also a part of said conspiracy and the purpose of said conspiracy to injure, oppress, threaten and intimidate Paul H. Maloney and Jacob Young, citizens and candidates for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, to-wit: their right and privilege as citizens to run for the office of Congressman in the Congress of the United States from the Second Congressional District of Louisiana, by preventing each of them from being legally and properly nominated as a candidate for said office; and, to-wit, their right and privilege to have counted for them as cast, all of the votes cast for them in said Democratic primary election;
>
> "That it was further a part of said conspiracy and the purpose of said conspiracy to deprive Paul H. Maloney and Jacob Young of the votes cast for them in said second precinct of the eleventh ward by not counting some of the votes cast for them and by eras-

ing the marks on the ballots placed by the voters in said precinct behind the names of Paul H. Maloney and Jacob Young indicating votes for Paul H. Maloney and Jacob Young, and placing in lieu thereof marks behind the name of T. Hale Boggs indicating votes for T. Hale Boggs."

Appellant, realizing at this late date the limitations placed upon the scope of Section 51,[2] now disclaims in the brief filed in this court any intention of seeking to sustain the application of Sections 51 and 52 to the rights of the unsuccessful candidates in and to the votes alleged to be cast for them at the primary elections. Appellant also disclaims any intention of challenging the ruling of the District Court insofar as it applies to that part of the conspiracy charged in the first count, as well as to the third and fourth counts, on which latter counts no appeal has been taken.

We know of no authority that permits the government to divide a count of an indictment brought by a Grand Jury by trying to differentiate the valid from the invalid part, as the government attempts to do in this case. The demurrer was aimed at the count in the indictment as a whole. The government has seen fit to submit to the Grand Jury an indictment, which charged a conspiracy to deprive not only the voters of their rights to have their votes counted, but also the candidates of their rights to the votes cast under the Constitution and laws of the United States. The government now concedes that it is not attempting to sustain that part of the count having to do with the rights and privileges of the candidates.

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[2] U. S. v. Gradwell, 243 U. S. 476; Ex parte Yarbrough, 110 U. S. 652; U. S. v. Mosley, 238 U. S. 383; U. S. v. Bathgate, 246 U. S. 218.

We confess that we have never heard of a demurrer filed in a criminal case having been partially sustained and partially overruled as to a count in an indictment. Either the count is valid as a whole, or invalid as a whole.

It cannot be assumed that the Grand Jury would have returned an indictment against the defendants which charged only a conspiracy to deprive the voters, and not the candidates, because that charges a crime different from the one the Grand Jury found, and they may not have voted it with the part omitted which the appellant now seeks to eliminate. The government cannot sever a count and contend that the count being partially valid that the other well-charged part of the count can be disregarded and the demurrer overruled. It would seem to be but plain logic that the court must either sustain a demurrer or overrule it. It cannot alter the charge found by the Grand Jury. The demurrer should be sustained if any well-pleaded substantial charge contained in the indictment is unconstitutional or otherwise invalid.

The Sixth Amendment of the Constitution requires all crimes to be by indictment found by a Grand Jury, and an indictment once found cannot be altered or changed to suit the exigencies of the prosecution. If such loose pleading were sanctioned by this court, a defendant could be materially prejudiced in his defense in being required to meet matters contained in an indictment which clearly have no place in it, and the government could draw duplicitous counts in indictments to the prejudice of defendants in all cases without fear of having a demurrer sustained on that well-recognized ground. A defendant

should never be required to answer to an indictment containing an unconstitutional or otherwise invalid charge, even if the invalidity strikes at only part of the charge. If he were found guilty on the count a motion in arrest of judgment would have to be sustained because the court would be unable to ascertain whether the jury based their verdict upon the valid or the invalid charge in the count. Therefore, if such a dangerous possibility exists, the count in its entirety should be dismissed on demurrer.

The charge in this first count is a conspiracy not only to deprive the voters of their rights, but also to deprive one candidate of his rights in favor of another candidate, and thus deprive an unsuccessful candidate of a right or privilege under the Constitution and laws of the United States.

A conspiracy to commit two or more crimes, *being itself but a single crime,* may be charged in one count.[3]

> "Words adequately charging a distinct offense cannot be rejected as surplusage." If they could, the vice of duplicity could be practiced with impunity.[4]
>
> "The rule is stated in 31 C. J. 774, Sec. 334, as follows . . . 'Where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another.'"
>
> "The principle of law which permits unnecessary and harmless allegations in an indictment to be disregarded as surplusage, does not authorize the court to garble the indictment, regardless of its general

[3] Frohwerk v. U. S. 249, U. S. 204; Magon v. U. S., 260 F. 811; Bryant v. U. S., 257 F. 378; Weinstein v. U. S., 11 F. (2d) 505.
[4] Creel v. U. S., 21 F. (2d) 690; U. S. v. Patty (D. C.) 2 F. 664.

tenor and scope, so as to entirely change the meaning."[5]

"And while immaterial averment may be rejected, there cannot be a rejection as surplusage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge and this includes those allegations which operate by way of description or limitation on that which is material."[6]

"That which may have been the ground of conviction cannot be rejected as surplusage."[7]

"At common law an indictment, being the finding of a grand jury upon oath and depending upon this fact, among others, for its validity, cannot be amended by the court or the prosecuting officer in any matter of substance without the concurrence of the grand jury which presented it."[8]

The decisions which have held that Section 51 applies to conspiracies to deprive voters of their right to vote, and have their vote counted as cast, are not analogous to the charge that the commissioner defrauded one candidate in favor of his rights under federal laws. The decisions have never gone so far as to hold that fraudulent count-

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[5] Joyce, "On Indictments", 2nd Edition (1924), Sec. 332. Littell v. State, 133 Ind. 577, 33 N. E. 817.

[6] Joyce, "On Indictments", 2nd Edition (1924), Sec. 332. Fulford v. State, 50 Ga. 591; Hill v. State, 41 Tex. 253; State v. Freeman, 15 Vt. 722. See also, U. S. v. Brown, 3 McLean (U. S.) 233, People v. Myers, 20 Cal. 76; Commonwealth v. Atwood, 11 Mass. 93; Jefferson v. State, 8 Ala. App. 364, 62 So. 315; State v. Flynn, 76 N. J. L. 473, 72 Atl. 296.

[7] Joyce, "On Indictments", 2nd Edition (1924), Sec. 332. Comm. v. Atwood, 11 Mass. 93; State v. Johnson, 255 Mo. 281, 164 S. W. 209; State v. Wilson, 91 Wash. 136, 157 Pac. 474; Naftzger v. U. S., 200 Fed. 494; State v. Duncan, 40 Mont. 531; 107 Pac. 510.

[8] 31 C. J., Sec. 413. Ex p. Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; Dodge v. U. S., 258 Fed. 300, 169 CCA 316, 7 ALR 1510, [certiorari den. 250 U. S. 660 mem., 40 S. Ct. 10 mem., 63 L. ed. 1194 mem.]; U. S. v. Davis, 6 Fed. 682.

ing of votes in favor of one candidate at such a primary violates any right or privilege as to the other, which are secured by the United States Constitution and laws, as to constitute an offense within the meaning and purposes of the Section.

That count should be construed as a whole and not piece-meal. So we submit that the judge was correct in sustaining the demurrer, not only for the reason that Section 51 does not apply to the affairs of a political party in conducting a party primary, but also because, as the government concedes, Section 51 could not apply to the purely private political rights of a candidate to a vote cast by a citizen. The right to vote and have the vote counted as cast belongs to the citizen according to the *Mosley* case, and not to the candidate.

POINT 3.

Count Two Invalid as it Does Not Adequately Allege That Defendants Acted Under Color of Law—Act 46 of 1940 Discussed.

Under Section 52, it must be adequately alleged that the defendants, in depriving the voters of their rights to vote, and have their vote counted as cast, acted under color of a law.

That count alleges that the defendants acted under color of a State law, to-wit: Act 46 of 1940. That Act provides for the regulation of primaries held by political

parties. There is nothing contained in Act 46 of 1940 which would justify the allegation that the defendants, acting as election commissioners on behalf of their political party in selecting its nominee at its primary, were acting under color of a law.

The principal governing body of the political party is the State Central Committee. Section 10 of the Act makes it clear that the Legislature did not intend that this Act should be so construed as to make the political party merely a creature of the State. It is also clear that the act was never intended to constitute any of its officials or members, officers or employees of the State. On the contrary, Section 10, in part, reads as follows:

> "They [members of the State Central Committee] shall never be considered as officers or employees of the State of Louisiana or any of its subdivisions."

The defendants, who are members of the political party and not officers or employees of the State of Louisiana, were selected as commissioners, pursuant to Section 61 of said act. They were chosen by lot from a list of names furnished by the candidates. It is the candidates, themselves, who name the commissioners. The commissioners do not act for or on behalf of the State of Louisiana. They are not officers or employees of the State of Louisiana. They are officers of a political party. They act for and on behalf of the political party, and not for and on behalf of the State of Louisiana, and therefore do not act under color of any law of the State of Louisiana. In one sense they are the representatives of the candidates, who alone have the right to name them, and the Parish Committee

merely sees that a fair drawing of the names of the commissioners is conducted. The Parish Committee which supervises the drawing is merely an agency of the party and not of the State.

REVIEW OF PARTY PRIMARY ELECTION LAWS OF LOUISIANA.

The Constitution of Louisiana of 1921 which is the present organic law of the State, provides for the enactment of laws to secure fairness in party primaries, conventions, etc.[9]

All State enactments of the legislature on that subject would, of course, be subordinate to that provision. That enactment shows clearly that it was the intention of the framers thereof not to disturb the fundamental concept of the political party system as a self governing voluntary organization. That provision would prohibit the legislature from fixing the qualifications of the voters. That important matter being left to be prescribed by the party, showing that it was recognized by the organic law of the State that a primary is nothing but a voluntary organization for the purpose of expressing party preference.

[9] Sec. 4, Art. 8. "The Legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates. No person shall vote at any primary election or in any convention or other political assembly held for the purpose of nominating any candidate for public office, unless he is at the time a registered voter, and have such other and additional qualifications as may be prescribed by the party of which candidates for public office are to be nominated. And in all political conventions in this State, the apportionment of representation shall be on the basis of population."

Act 46 of 1940 is the existing law which regulates the primaries, and was enacted to insure fairness in any primary called by a political party. It is a comprehensive law consisting of 48 pages of regulatory provisions. It has been adopted in the exercise of the police power of the state, as recognized in the aforesaid constitutional provision.

Its aim has not been to take control of the affairs of the party or to deprive it of any of its rights, but simply to act upon and regulate existing conditions, with a single view to the public interest.

From beginning to end all of the organization and internal operation of the party, as well as the conduct of the nominating primary is left entirely in the hands of the officers and members of the party. In fact, all officers and employees of the State or its subdivisions are prohibited from remaining at or near the polls.

Sec. 1 provides that nominations of all political parties shall be by direct primary elections.

Sec. 2 defines the term "political party" to be one that shall have cast 5% of the entire vote in certain preceding elections.

Sec. 5 provides for the election of the members of the governing body of the party which is known as the "State Central Committee," as well as the subordinate committees of the party.

Sec. 9 provides for the duty of the Chairman of the State Central Committee to appoint *interim* officers of subordinate committees.

Sec. 10 relates to the election of the State Central Committee and provides *that they shall never be considered officers or employees of the State of Louisiana, or any of its subdivisions.*

That provision was placed in the act no doubt by the legislature in an abundance of precaution in order to eliminate any question concerning the status of the party and its officers, members and employees.

Sec. 14 being important as showing that the State Central Committee is the governing body of the party is quoted in full, as follows:

> "The State Central Committee of each party, as defined herein, is hereby vested with full power and authority to make and adopt any and all rules and regulations for its government and for the government of any committee in this Act authorized to be created, which are not inconsistent with the Constitution and laws of the State of Louisiana or the Constitution and laws of the United States. It shall have full and complete authority to provide the conditions under which its members may vote by proxy; to provide for the payment of the expenses of its officers and employees."

Sec. 31-a provides for a cash deposit from candidates and,

Sec. 31-e authorizes the committee to levy, assess and collect from each candidate additional cash to be used for incidental and other expenses in connection with the primary; it further provides for the return of the cash deposit if it shall remain unexpended in said primary election.

Sec. 35 provides for the payment of the expenses of the primary, as follows:

(a) Printing ballots, stationery and supplies and transmission of returns—paid by state;

(b) Holding of elections such as payment of commissioners, rent of polling places, etc.—paid by municipalities, parishes, cities, etc.;

(c) All other expenses paid by candidates.

In the *Grovey*[10] case, one of the reasons stated in the opinion, showing that the action of the officials of the party was not the act of the state, was that the State of Texas did not pay any of the expenses of the primary.

That was only one of many cumulative reasons, and was not the sole test. We do not understand that case to hold that if the State did donate or appropriate money for a public purpose such as the payment of the expenses of a primary, that the organization receiving the benefit would by that fact alone be constituted a creature of the State. The fact that the State did not pay such expenses would be a factor to consider in determining

[10] Grovey v. Townsend, 295 U. S. 45.

whether the acts of the party were state action, but the converse of this would not logically follow.

The Federal Government today subsidizes many public operations; witness, the extensive grants to cities, counties, and states and their subdivisions under the now familiar Works Progress Administration, to cite but one example. It would be just as anomalous to argue that the political party receiving the benefit of the grant in the form of the payment of part of the expense of the primary, became by that fact alone, the creature of the State, as it would be to argue that the cities, counties and states and their subdivisions receiving the benefit of the W. P. A. subsidies became the creatures of the Federal government by reason of such grant or subsidy.

In this case the state pays only a minor part of the expenses, the balance being paid by the municipalities and the candidates.

The criterion should not be the payment of the expense of the primaries. The fundamental concept of the nature of political parties should alone be considered. That concept is that they are voluntary political associations, regulated by the State, but operated by their own officers and members. That is the concept the legislature had in mind in passing the act, and following the intent of the lawmakers is the cardinal principle of statutory construction.

The organic law of this State makes that purpose clear, and the Legislature recognized it as such in providing that the members of the State Central Committee should

not be considered as officers or employees of the State, or any of its political subdivisions. The greater always includes the lesser, and it could not be successfully contended that the subordinate committees under the control and direction of the State Central Committee were officers or employees of the State, or any of its subdivisions. *A fortiori* is that true of any of the lesser officers or employees of the party such as the defendants in this case, who acted as commissioners at the primary. They were merely officers of the party.

They were not paid by the State, but by the City of New Orleans. The fact that they received five dollars for the services they performed that day from the City of New Orleans, would not any more make them officers or employees of the City or State than would some independent contractor, such as a plumber called in by the City to do a single day's work for the sum of $5.00 be considered in law an officer or employee of the City. We have to look to the intent of the law to determine their status.

No doubt in such a broad subject as this, various narrow, technical points such as the aforesaid could be advanced and argued to sustain the position taken by appellant that the conduct of the primary was State action—hence the defendants acted under color of a law.

Such arguments should not be indulged. The intent of the legislature as reflected in the organic law of the State should control, and the legislature could not have made it plainer that they did not intend the conduct of the party

primary to be the action of the State than to specifically provide that the members of the governing body should not be officers or employees of the State or any of its subdivisions.

Sec. 96 indicates that the State intends that the primary be conducted without interference from any officer or employee of any municipality or any subdivision of the State for it prohibits such officer or employees from appointing special police to serve at any polling place, and

Sec. 97 prohibits State police, or any person having the power and authority of making arrests, or carrying arms, or who perform the duties and functions which are usually performed by police officers from going to, or remaining at, or being stationed at, or exercising or attempting to exercise any authority at any polling place or in the immediate vicinity of any polling place in any primary election.

Sec. 94 makes officers or employees of the State or any of its subdivisions ineligible as watchers or special deputies.

The aforesaid provisions, being clearly for the purpose of leaving the conduct of the election to the party, and its officers, without danger of interference on the part of the officers or employees of the State. The other sections throw no light on the subject; they detail the manner of conducting the election, election contests, second primaries, etc.

It is also to be noted that the general elections are governed by an entirely different act,[11] and are provided for by a different Article of the Constitution.[12]

Therefore, it seems that on the face of the indictment, Count 2 fails to set forth an essential element of the crime, that is to say, that these defendants acted under color of a State law.

STATE REGULATION OF POLITICAL PARTY DOES NOT CONSTITUTE IT CREATURE OF STATE.

The fact that a political party, and its nominating primary is regulated by State law, does not by that fact alone make it a creature of the State, nor does it make the party's officials, officers or employees of the State of Louisiana.

To so hold would be equivalent to finding that any business, trade or profession which is regulated by State law constitutes such business, trade or profession the creature of the State which regulates it. In these modern times, and because of the complexity of our economic system, it becomes increasingly necessary for the State to exercise its police power in the interest of the safety, health and well-being of the citizens, by regulating various political, economic and social acitivities.

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[11] Act 130 of 1916.
[12] Art. 8, Sec. 9, et seq.

Many activities have been held the proper subject for regulation.[13]

In origin political parties were purely voluntary associations;[14] had inherent power to determine their own membership and to regulate the participation in their primaries,[15] and were not state instrumentalities.[16] They are so affected with a public interest that they are subject to regulation under the general power of the state to supervise the entire election system,[17] by legislative enactments,[18] which have actually been promulgated in all the states except Connecticut, New Mexico, Rhode Island and Utah.

The question therefore, is one of determining whether the fact that a state has undertaken to regulate political parties and their primaries makes the conduct of primary election officers state action.

The fact that a state has done so should not make such conduct state action,[19] for the primary is still the same

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[13] 12 C. J. Sec. 432. "Particular Subjects of Regulation—a. Occupations. The following named occupations and persons engaged therein are proper subjects of regulation under the police power, namely, agriculture, attorneys at law, auctioneers, banking, barbers, brokers, building and loan associations, carriers, carpet beating by steam power, corporations, dentists, detectives, druggists, employment agencies, factors, ferries, garages and garage keepers, hackmen, hawkers and peddlers, junk dealers, innkeepers, insurance, laundries, livery-stable keepers, mining, pawn-brokers, physicians, pilots, plumbers, railroads, sale of securities, secondhand dealers, slaughterhouses, street railroads, telegraphs and telephones, ticket brokers, warehousemen, and wharfingers."

[14] Merriam American Political Ideas (1920); Ray, An Introduction to Political Parties and Practical Politics (1913).

[15] Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181 (1909).

[16] Kearns v. Hamlett, 188 Pa. 116 Atl. 273 (1892); McKane v. Adams, 123 N. Y. 609, 25 N. E. 1057 (1890).

[17] People v. Board of Election Comm., 221 Del. 9, 77 S. E. 311 (1906).

[18] Lett v. Dennis, 129 So. 33 (Ala. Sup. 1930).

[19] Cunningham v. McDernett, 277 S. W. 218 (Tex. 1925); Kay v. Schneider, 110 Tex. 369.

as and a substitution for the old caucus and convention.[20] If statutory regulation made men public officials, when they were admittedly not exercising a governmental function, though their function did involve the general public interest, then railroad conductors, physicians, and many business and professional men would be public officers.[21]

The medical profession has for many years been the subject of regulation by the state in the interests of the health and public welfare of the communities of this nation. Yet, we do not believe that anyone would argue that because the States have seen fit to regulate that profession by comprehensive systems of law, that the medical profession is a creature of the State, or that any of its members are officers or employees of the State by reason of any such law.

We do not believe that anyone would argue that if the medical profession formed an organization to further its own objects and purposes, and would hold any kind of an election pertaining to its own affairs, that any irregularities of fraud practiced in such election would be the subject of an indictment, under Sections 51 or 52.

So by analogy it seems that if citizens see fit to organize for political purposes instead of professional purposes, and their organization, being affected with a public interest, is regulated by laws of the State, that such a voluntary organization is not any more subject to prosecution under Sections 51 and 52, than would be the voluntary associa-

[20] Hamilton v. Davis, 217 S. W. 431 (Tex. 1920).
[21] People v. Brady, 302 Ill. 576, 135 N. E. 87 (1922); Faxwell v. Beek, 177 Md. 1, 82 Atl. 657 (1912); Greenough v. Lucey, 28 R. I. 230, 66 Atl. 300 (1907).

tion of the medical profession or any other business, trade or profession affected with a public interest.

POINT 4.

Argument Based On Jurisprudence Of This Court As To Whether Primary Is An Election Within Meaning Of Sec. 4 Of Art. 1, Of The Constitution.

It has been held that the right to vote and to have said vote properly counted at a general election, is a right secured to citizens by the Constitution and laws of the United States.[22] The theory of this jurisprudence is that since Section 4 of Article I of the Constitution of the United States provides for the time, place and manner for holding elections for members of Congress that Congress has a right to regulate and control by statute the elective franchise insofar as it pertains to the election of members of Congress.

There is no case that our research has disclosed which has ever held that Section 4 of Article I would extend to, or embrace free and voluntary associations for political action such as the political party which selected its party nominee in this State on September 10, 1940.

On the contrary, this court has held that the only source of power which Congress, prior to the adoption of the Seventeenth Amendment,[23] possesses for election, over

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[22] U. S. v. Mosley, 238 U. S. 383; Ex parte Yarbrough, 110 U. S. 652.

[23] The 17th Amendment has no bearing on this case as it applies only to Senatorial elections, this being a primary for a nomination of a member of the House of Representatives.

senators and representatives was Section 4, of Article I, of the Constitution, which empowers Congress to regulate the manner of holding such elections, and that this did not give Congress the power to regulate primary elections for the purpose of selecting candidates for Congress.

This court has held that primaries are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer to support for ultimate choice by all qualified electors. The court has further held that general provisions affecting elections in Constitutions or statutes are not necessarily applicable to primaries,—the two things being radically different.[24]

The constitutional question came before the Supreme Court in the famous *Newberry* case in 1921.[25] Truman H. Newberry was elected senator from Michigan in 1918. He and sixteen associates or agents were convicted in the federal district court and variously sentenced to fine and imprisonment for conspiring to violate the federal corrupt practices acts. It was shown at the trial that disbursements of at least $195,000 had been made in Newberry's primary campaign, although the Michigan law (applicable under the federal statute) allowed a maximum of only $1,875, that is, 25 per cent of the senatorial salary. Upon appeal, however, the Supreme Court unanimously reversed the conviction.[26]

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[24] Newberry v. U. S., 256 U. S. 232; U. S. v. Gradwell, 243 U. S. 476; Grovey v. Townsend, 295 U. S. 45; Nixon v. Herndon, 273 U. S. 536; Nixon v. Conden, 286 U. S. 73; U. S. v. O'Toole, 230 F. 993.

[25] Newberry v. U. S., 256 U. S. 232.

[26] The Senate, being the sole judge of the qualifications of its members, accepted the decision of this Court by voting to permit Newberry to take his seat as a member of that body.

All of the justices agreed to the decision, but did not concur in the reasons. (1) Justice McReynolds (Justices Day, Holmes, and Van Devanter concurring) held that a primary is not an election within the meaning of Article I, Section 4, of the Constitution, and that therefore the act of 1911 was unconstitutional in its attempted application to primaries. (2) Justice McKenna was of the opinion that the regulation of senatorial primaries exceeded the power of Congress as it stood in 1911, but reserved the question as to whether it would have been constitutional if enacted after the ratification of the Seventeenth Amendment.[27] (3) Chief Justice White (Justices Brandeis, Clark and Pitney concurring) agreed to the results but on the ground of prejudicial error in the trial judge's charge to the jury, upholding however, the authority of Congress to regulate primaries. Thus three different positions were taken: according to four justices, Congress had no power to regulate senatorial primaries before the Seventeenth Amendment and acquired none by its adoption; according to one justice, Congress had no such power before the amendment, but might possibly have acquired it through the adoption of the amendment insofar as senatorial elections are concerned; and, according to four justices, Congress always had such power. As applied to the facts in our case it would simply have been a five to four decision.

In speaking of primaries the majority opinion in that case stated that they,

> "are in no sense elections for an office, but merely methods by which party adherents agree upon candi-

[27] It is to be noted that the 17th Amendment applies only to Senatorial elections, and that amendment could not have troubled Justice McKenna if the election had been for a member of the House of Representatives as in the instant case.

dates whom they intend to offer and support for ultimate choice by the qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. And this view has been declared by many state courts. . . . If it be practically true that under present conditions a designated candidate is necessary for an election,—a preliminary thereto,—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Many things are prerequisite to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. . . . Birth must precede, but it is no part of funeral or apotheosis. We cannot conclude that authority to control party primaries or conventions for designating party candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with the purely domestic affairs of the state and infringe upon liberties reserved to the people."

JURISPRUDENCE OF STATE COURTS DISTINGUISHING BETWEEN PRIMARY AND ELECTION.

The state courts also differentiate in general between a nominating primary and an election, holding the two to be distinct and apart.[28] More particularly, it has been held that primary elections to choose delegates to conventions are not within constitutional or statutory requirements in regard to elections;[29] that primary elections are not a part of the general election because held at the same time as the latter with the same machinery merely for convenience and economy;[30] that primaries are not elections within the common law meaning of the term;[31] that laws providing for the determination of contested elections do not apply to primary elections;[32] that a statute making it a misdemeanor to place any bet or wager on any election did not apply to primaries;[33] that a statute disqualifying a person from holding office when he shall have given a bribe, threat or reward to secure his election did not apply to primaries;[34] and that it is not an offense for officials

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[28] State v. Erickson, 119 Minn. 152, 156, 137 N. W. 385 (1912); State v. Taylor, 220 Mo. 618, 119 S. W. 373 (1909); Ledgerwood v. Pitts, 122 Tenn. 510, 587, 125 S. W. 1036 (1910); Commonwealth v. Wells, 110 Pa. St. 463, 468, (1885); People v. Cavanaugh, 112 Cal. 674, 676, 677, 44 P. 1057 (1896); Martin v. Schulte, 182 N. E. 703 (Ind. 1932); Sawyer v. Frankson, 134 Minn. 258, 159 N. W. (1916); Kay v. Schneider, 110 Tex. 369, 876, 218 S. W. 479, 221 S. W. 880 (1920); Waples v. Marrast, 108 Tex. 511, 184 S. W. 180, L. R. A. 1917 A. 253 (1916).

[29] State v. Woodruff, 68 N. J. L. 89, 56 Atl. 204 (1902).

[30] State ex rel. McCue v. Blaisdeel, 18 N. D. 55, 118 N. W. 141 (1908).

[31] State v. Woodruff, 68 N. J. L. 89, 56 Atl. 204 (1902); Hester v. Brunland, 80 Ark. 145, 95 S. W. 992 (1906); Lowe v. Bd. of Election Canvassers, 154 Mich. 329, 117 N. W. 780 (1908); State v. Johnson, 87 Minn. 221, 91 N. W. 604 (1902); State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728 (1908).

[32] Jones v. Fisher, 156 Iowa 512, 137 N. W. 940 (1912).

[33] Lillard v. Mitchell, 37 S. W. 702 (Tenn. Ch. App. 1896); Commonwealth v. Helm, 9 Ky. L. Rep. 532 (1887); Dooley v. Jackson, 104 Mo. App. 21, 78 S. W. 330 (1904).

[34] Gray v. Seitz, 162 Ind. 1, 69 N. E. 456 (1904).

at primaries to electioneer, when the general election laws forbid it.[35]

MEANING OF WORD ELECTION AS USED IN ART. I, SEC. 4 OF THE CONSTITUTION.

Art. I, Sec. 4 provides:

> "The times, places and manner of holding *elections* for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." (Italics supplied.)

If the word "elections", as used in this section of the Constitution, is by a process of judicial interpretation held to include the manner by which a voluntary association, or political party selects its candidates by direct primary, (a concept unknown by the framers of the Constitution), then we may logically conclude that Congress may pass laws to regulate the internal affairs of political parties, and dictate the time, place and manner of their selection or nomination of the candidate they will support in the ensuing general election, or may prohibit the holding of primaries altogether.

This court has never gone that far in the history of the nation. Even in the celebrated series of Texas primary cases, this court has not adopted the theory that the primary was an election, as witness the case of *Nixon v.*

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[35] State v. Simmons, 117 Ark. 159, 174 S. W. 238 (1915).

Herndon, 273 U. S. 536, where the court did not adopt the theory that exclusion from a primary by specific state law *would constitute a denial of the right to vote* within the meaning of the 15th Amendment, which reads in part as follows:

> "The right of citizens of the United States to *vote* shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." (Italics supplied.)

but found the law unconstitutional exclusively under the equal protection clause of the 14th Amendment. This court once again refused to proceed under the 15th Amendment, but proceeded exclusively under the 14th Amendment in the case of *Nixon v. Condon*, 286 U. S. 73, in declaring the Texas statute unconstitutional as being a delegation of legislative authority, hence, state action, when the legislature passed a law giving to the State Executive Committee authority to determine the qualification of the voter who might participate in the primary, when the committee passed a rule that only white persons could vote.

The power conferred upon Congress in Sec. 4 of Art. I is a limited power. It was not intended to deprive the people of the States of their freedom with respect to their political activities.

The Article gives the Congress the right to regulate, "The times, places, and manner of holding elections," and nothing more.

At one time in our constitutional history Congress has seen fit to assert this power in the famous so-called force bills of 1870.

Since Congress asserted its power to the fullest extent, in those enforcements Acts of 1870, the limitation upon their power is illustrated by a consideration of the history of those bills which will be found in *United States v. Gradwell*, 243 U. S. 476, 482-484, as follows:

> "Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government, our legislative history upon the subject shows that, except for about twenty-four of the one hundred and twenty-eight years since the Government was organized, it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are. For more than 50 years no congressional action whatever was taken on the subject until 1842 when a law was enacted requiring that Representatives be elected by Districts (5 Stat. 491), thus doing away with the practice which had prevailed in some States of electing on a single State ticket all of the Members of Congress to which the State was entitled.
>
> "Then followed twenty-four years more before further action was taken on the subject when Congress provided for the time and mode of electing United States Senators (14 Stat. 243) and it was not until four years later, in 1870, that, for the first time, a comprehensive system for dealing with congressional elections was enacted. This system was comprised in Sections 19, 20, 21 and 22 of the Act approved May 31, 1870, 16 Stat. 144; in Sections 5 and 6 of the Act approved July 14, 1870, 16 Stat. 254; and in the Act

amending and supplementing these acts, approved June 10, 1872, 17 Stat. 347, 348, 349.

"These laws provided extensive regulations for the conduct of congressional elections. They made unlawful, false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election and the neglect by any such officer of any duty required of him by state or federal law; they provided for appointment by Circuit Judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such elections, with authority to arrest for any breach of the peace committed in their view.

"These laws were carried into the revision of the United States Statutes of 1873-4, under the title 'Crimes against the Elective Franchise and Civil Rights of Citizens,' Rev. Stats., Sections 5506 to 5532, inclusive.

"It will be seen from this statement of the important features of these enactments that Congress by them committed to federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete. It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections and repealed all of these laws with the exception of a few

> sections not relevant here. Act approved February 8, 1894, 28 Stat. 36. This repealing act left in effect as apparently relating to the elective franchise, only the provisions contained in the eight sections of Chapter 3 of the Criminal Code, Sections 19 to 26, inclusive, which have not been added to or substantially modified during the twenty-three years which have since elapsed."

A distinction is at once apparent between the regulation of the manner of holding elections, in order to protect the right of the voter in casting his vote, and to secure a fair count of the vote; and the attempt to interfere with or control the activities of the people of the States in the conduct of political campaigns and the nominating process.

Alexander Hamilton in The Federalist, in meeting the serious criticism which the proposed provision had evoked, said:

> "As to the Senate, it is impossible that any regulation of 'time and manner', *which is all that is proposed to be submitted to the national government in respect to that body,* can affect the spirit which will direct the choice of its members." (Italics ours.) (The Federalist, No. LX.)

And again Mr. Hamilton said, in answering an objection with respect to the regulation of places for the election of members of the House of Representatives that these might be confined to particular districts so as to promote the interests of classes:

> "The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those

who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the Legislature."

See, also:

Luther Martin's "Genuine Information", in Farrand's Records of Federal Convention, Vol. 3, pp. 194, 195;

Rufus King in Massachusetts Convention, Farrand's Records, Vol. 3, p. 267;

James Madison in Virginia Convention, Farrand's Records, Vol. 3, pp. 311, 319;

William R. Davie in North Carolina Convention, Farrand's Records, Vol. 3, pp. 344, 345;

Roger Sherman in House of Representatives, Farrand's Records, Vol. 3, p. 359.

The Constitution gives to Congress no power to regulate the process of nomination.

The first time the question came before this court was in the *Gradwell* case, *supra*. The Court said (pp. 487-489):

"The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the 'times, places and manner of holding elections (not nominating primaries) for Senators and Representatives.' Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the Constitution was adopted but they were equally un-

known for many years after the law, now Section 19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development, under a variety of State laws.

"The claim that such a nominating primary, as distinguished from a final election, is included within the provision of the Constitution of the United States applicable to the election of Senators and Representatives is by no means indisputable. Many state supreme courts have held that similar provisions of state constitutions relating to elections do not include a nominating primary. Ledgerwood v. Pitts, 122 Tennessee, 570; Montgomery v. Chelf, 118 Kentucky, 766; State ex rel. Von Stade v. Taylor, 220 Missouri, 619; State v. Nichols, 50 Washington, 508; Gray v. Seitz, 162 Indiana, 1; State v. Erickson, 119 Minnesota, 152.

"But even if it be admitted that in general a primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us, because of some strikingly unusual features of the West Virginia law under which the primary was held out of which this prosecution grows. By its terms this law provided that only candidates for Congress belonging to a political party which polled three per cent of the vote of the entire State at the last preceding general election could be voted for at this primary, and thereby it is said at the bar, only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded, as were also independent voters who declined to make oath that they were 'regular and

qualified members and voters' of one of the greater parties. Even more notable is the provision of the law that after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than five per cent of the entire vote polled at the last preceding election. Acts West Virginia, 1915, c. 26 pp. 222, 246.

"Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law and nothing of the kind can be found in any federal statute. Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.

"What power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro,

cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia.

"The claim that the Federal Corrupt Practices Act (June 25, 1910, c. 392, 36 Stat. 822, amended August 19, 1911, c. 33, 37 Stat. 25, and August 23, 1912, c. 349, 37 Stat. 360), recognizing primary elections and limiting the expenditures of candidates for Senator in connection with them is, in effect, an adoption by Congress of all state primary laws is too unsubstantial for discussion; and the like claim that the temporary measure (Act of June 4, 1914, 38 Stat. 384), enacted by Congress for the conduct of the nomination and election of Senators until other provision should be made by state legislation cannot be entertained, because this act was superseded by the West Virginia primary election law, passed February 20th, 1914, effective ninety days after its passage."

The question again arose in *United States v. Blair*, 250 U. S. 273, where the Court said (pp. 278-279):

"It is maintained further that, because of the invalidity of these statutes, neither the United States District Court nor the Federal Grand Jury has jurisdiction to inquire into primary elections or to indict or try any person for an offense based upon the statutes, and therefore the order committing appellants is null and void.

"The same constitutional question was stirred in United States v. Gradwell, 243 U. S. 476, 487, but its determination was unnecessary for the decision of the case, and for this reason it was left undetermined, as the opinion states. Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an

Act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

"We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry."

And, referring to some of the State cases, the District Court in *United States v. O'Toole*, 236 Fed. 993, 996, (heard with *United States v. Gradwell*, 243 U. S. 476 and affirmed), said:

"We think it may be said both on reason and authority that, where the word 'election' is used without qualification, the reference is to a general election, as distinguished from a primary election. State v. Johnson, 87 Minn. 221, 91 N. W. 604, 840; Montgomery v. Chelf, 118 Ky. 766, 82 S. W. 388; Gray v. Seitz, 162 Ind. 1, 69 N. E. 456. Certainly it cannot be contended that the choosing or election by the qualified electors provided for by Section 2 of Article 1 of the Constitution of the United States includes the selection of party candidates by primary election, for at that time such elections were unknown. We can find no provision of the Constitution of the United States or of an act of Congress which either directly or by implication warrants the Court in holding that the protection of the federal government extends to the right of any citizen to participate in a party endorsement of a candidate through a primary election or otherwise. The right is created by party rules or state legislation, and the remedy, if there be one, must be derived from the same source."

The specific point at issue here is—what did the authors of the Constitution mean by the term "election" which they used in the article?

A so-called nominating primary was unknown at the time the Constitution was adopted. It was born about 100 years after the adoption of the Constitution.

A nominating primary is not an election any more than the nominating convention or its predecessor the caucus is an "election".

What the term "elections" meant at the time of the adoption of the Article it means now.

That distinction is undoubtedly what Mr. Justice McKenna had in his mind, in reserving judgment on cases that came up involving statutes passed to regulate the election of Senators after the passage of 17th Amendment. No doubt Mr. Justice McKenna felt it may be argued that since the nominating primaries were known at the time of the passage of the 17th Amendment that the language used in the 17th Amendment may be sufficiently broad to cover the nomination process in senatorial elections. However, that question has never been decided, and is not before the Court in this case.

In *Hawke v. Smith*, No. 1, 253 U. S. 221, this court said:

> "The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by '*Legislatures*'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted

it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. * * *

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States."

That case is clearly decisive of the fact that the proper method of determining the meaning of a word in the Constitution is to ascertain its meaning at the time of the adoption of the Constitution. Whatever it meant then it means now.

Just as the Court in the *Hawke* case, *supra*, said, that the word "Legislature" was to be construed to have the same meaning at the time that case was decided as it had when the Constitution was adopted; so we say, that direct primaries being unknown at the time of the adoption of the Constitution, that the word "election" should be construed in accordance with its well-defined meaning at the time of the adoption of the Constitution. It cannot be reasonably disputed that the term "election" as used in Sec. 4 of Art. 1 had reference to the taking of the vote for the office of the Congress of the United States.

It might be argued that this contention conflicts with the familiar rule of Constitutional law, to the effect that, when a constitutional provision embodies a certain concept, whatever is properly within the concept is embraced within the words of the Constitution, although it lay far beyond the vision of the framers of the Constitution.

Witness the application of the commerce clause of the Constitution to new instrumentalities of transportation and communication unknown to the framers of the Constitution.

But this is so because those new instrumentalities are in fact interstate commerce, even though the fathers of the Constitution did not ever dream that such instrumentalities or conditions would ever exist. They come within the meaning or definition of interstate commerce; the power exercised must be found within the definition of the power conferred. (See *In re Debs*, 158 U. S. 564, 591):

> "The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

No one could logically say that the nominating process, whether by direct primary, caucus or convention comes within the definition of the power conferred upon Congress by the Constitution to regulate "elections". It seems clear that the nominating process is not embraced within the concept "elections" as that term was understood at the time of the adoption of the Constitution, and as it is presently understood as shown by the weight of authority.[36]

The word "elections" standing alone has a very different meaning from that which it has when qualified by the word "primary". "Primary elections" which evolved from the caucus and convention nominating system stand on no

[36] See appendix, page 53.

different footing with respect to the meaning of this clause of the Constitution than did the old caucus or convention.

Therefore, Congress has no more power to regulate the primaries than it would have to regulate the conventions in the several states which still use that method.

The States have begun to regulate the nominating process only in comparatively recent years. It is a matter of history that this Court could judicially notice, that at the time of the adoption of the Constitution, such regulations were unknown. The States, of course, had laws governing the general elections, and it was such laws that were in the contemplation of the members of the Constitutional conventions when they adopted Sec. 4 of Art. I, and they had no intention of delegating power to regulate the nominating process or otherwise surrender their political freedom or they would have added some clause to that article to so indicate. At the time of the adoption of the constitution, primary elections being unknown, some descriptive clause would have to be added to the words "times, places and manner of holding elections", such as ("caucuses, conventions or other nominating processes") for no one would argue that a caucus or convention was an election, and if it is argued that the nominating process is included in the article, it would be necessary to urge that "elections" included caucuses and conventions because nominating primaries did not exist at that time.

If this Court, in the *Hawke* case, *supra*, would not extend the word "Legislatures", as used in Article V, so as

to include the people themselves when voting in a referendum, but restricted the word to the representative body, because as the Court said the word "Legislatures" was not a term of uncertain meaning when incorporated into the Constitution, and that what it meant when adopted it still means for the purpose of interpretation, *a fortiori* should the word "election" be restricted to the well-defined meaning that it had when incorporated into the Constitution, because the fact that the framers of the Constitution intended it to be so restricted is more easily susceptible of ascertainment than was the case of the meaning of the word "Legislature" as interpreted in the *Hawke* case, *supra*.

In the *Hawke* case, *supra*, this Court in speaking of the word "Legislatures" said,

> "The term is often used in the Constitution with this evident meaning." [As referring to the representative body.]

It might be of assistance to the court in resolving this question for us to examine other articles of the Constitution as was done in the *Hawke* case in an effort to examine the evident meaning of the word "elections", as used in Sec. 4 of Art. I.

It appears that the other articles show that the term "elections" has exclusive reference to elections *for the office itself*, for the following reasons:

No other sort of elections was known at the time;

A nomination is not an election for Senator or Representative, it is merely the selection of the candidate by the party to be supported at the ensuing general election.

Sec. 6, Art. I, Subdivision 2, provides,

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States," etc.

There the word "elected" could not possibly mean "nominated" for the Member of Congress is elected at the "election" and not before.

Sec. 2 of Art. I makes reference to "electors". The "elections" of Members of Congress referred to in Sec. 4 of Art. I, and the manner of holding which may be regulated by Congress, are the "elections" at which the "electors" referred to in Sec. 2 of Art. I vote. Those "electors" do not necessarily vote at the primaries. It is because they vote at the "elections" for Members of the House of Representatives that they are called "electors". But the term "electors" like the term "elections" has no reference to a nominating primary. If the power is vested in Congress to regulate a nominating primary, it likewise is vested with power to regulate a nominating convention and the vote of delegates at a nominating convention. Manifestly, such a vote is not an "election" and the delegates are not "electors" within the meaning of the Constitution.

The term "elections" as used in Sec. 4 of Art. I means clearly the final choice of persons for public office. The

clause itself refers to "elections for Senators and Representatives". The election is the taking of the vote for the persons who are to fill, when chosen, the public office in question. This is clearly shown by the context. The "time" of the election means the time when the choice of the public officer is made. The "place" means the location of the actual casting of the ballots—where the election is held. "The manner of holding" refers to the method of holding the election to determine that choice. The exception as to Senators shows that a nominating process was not intended because the Senators were elected by the Legislature—hence the power to fix the place for holding the "elections" as to Senators was withheld from Congress, thus emphasizing the point.

Insofar as the Federal Constitution is concerned, no nominating process is necessary to the election. The Constitution makes no attempt to control the political activity of the citizens with the exception of the matters concerning the times, places, and manner of holding elections. The political activities with the exceptions just noted were left with the local authorities.

Storey on the Constitution, Sections 815-828, states that Sec. 4 of Art. I was assailed by the opponents of the Constitution "with uncommon zeal and virulence". The opponents were in a measure appeased by the assurance that was given them to the effect that the clause was confined to the regulation of the times, places, and manner of holding elections.

Alexander Hamilton, after reviewing the objection and defending clause in question as against the assertion of a broader power in Congress, thus stated the conclusion:

> "Its authority" (that is, the authority of the National Government) "would be expressly restricted to the regulation of the *times*, the *places*, and manner of elections." (Italics, Hamilton's, The Federalist, LX.)

This argument prevailed only because the opposition were assured and felt satisfied that only a limited power had been delegated to the national government, and it was on that basis that Alexander Hamilton, the great protagonist for the Constitution, was able successfully to defend the clause. He could never have defended the theory that the people were surrendering such rights to the Federal government as would authorize that sovereign power to supervise the methods that should be employed to enlist support of a candidacy.

If Congress has the power which appellant seeks to attribute to it here, it has the power to abolish all primary elections for Senators and Representatives in every State in the Union. It has the power to establish conventions, to overthrow conventions, to provide any sort of a primary that it may desire to provide.

If it has such power then the fears of the people who were opposed to the article that Congress might contrive the manner of holding elections so as to exclude all but their own favorites from office would seem to be justified. (See Storey on the Constitution, Secs. 815-828.)

The fears of the people who opposed that Article were allayed by the assurance of Hamilton that the authority of the National Government would be limited, and that they, the citizens, would retain their political freedom, the surrender of which was never intended by the people. That which is not within the enumerated powers of the national government cannot be brought within the power of regulation merely because of the existence of opinion that it would be advisable that Congress should exercise the power (see *Hammer v. Dagenhart*, 247 U. S. 251).

The people were jealous on all matters affecting their political liberty at the time of the adoption of the Constitution, and on that subject were most careful with respect of any grant of power, and to construe Sec. 4 of Art. I, as though it would embrace a nominating system would be, we think, an unreasonable construction.

As far as our research has gone there is not a word in the Constitution or elsewhere, which could justify the conclusion that the term "elections" in Sec. 4 of Art. I, embraces any nominating system.

GENERAL REPLY TO APPELLANTS' CONTENTIONS MADE IN STATEMENT OF JURISDICTION BRIEF.

In the brief filed in this Court, the government concedes the holding in the *Newberry* case just mentioned, but comments that only a minority of the Court concurred in the chief opinion which held that the federal government had no right to regulate primary elections, which

statement, of course, is erroneous. It points out that the statute at issue in that case was enacted prior to the 17th Amendment, but also admits that Sections 51 and 52 were also enacted prior to the 17th Amendment and tries to differentiate by stating that in the *Newberry* case the general validity of the statute was at issue, whereas in this case the validity of the present application of Sections 51 and 52 are at issue.

We fail to see any distinction here at all. It is elementary that the unconstitutional application of a statute is just as much subject to attack as is a statute which is unconstitutional in general.

The government's principal argument is as follows:

> "The questions presented in the instant case are, we believe, of paramount public importance. The relationship between a primary election and the ensuing general election is so intimate that the outcome of the former is often determinative of the latter. This is particularly so in those sections of the country where nomination is tantamount to election and the election becomes merely perfunctory. Hence, a voter may be as effectually deprived of his right or privilege of participating in the final selection of Senators and Representatives where acts such as those charged in the indictment were committed at a primary as where they took place at the general election."

Appellant is in error when it states in its brief that the Court emphasized that the statute involved in the *Newberry* case was passed before the 17th Amendment. Four of the Justices held that Congress had no power to regulate *senatorial* primaries before the 17th Amendment,

and acquired none after its adoption. Justice McKenna held that the regulations of *senatorial* primaries exceeded the power of Congress as it stood in 1911, but reserved the question as to whether it would have been constitutional if enacted after the ratification of the 17th Amendment.

The 17th Amendment reads as follows:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.
>
> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; Provided, That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.
>
> "This amendment shall not be so constructed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

It must be noted that the aforesaid Amendment deals entirely with the election of Senators by Direct Vote. No Senator was up for nomination in the case at bar, therefore, that Amendment has no bearing on this case. In the *Newberry* case, Truman H. Newberry, the appellant, was a candidate for the Senate—hence, Justice McKenna's reservation of the question under the 17th Amendment. If Newberry had been a candidate for the House of Representatives as is the situation in our case, Justice Mc-

Kenna would have had no ground to reserve the question under the 17th Amendment as that Amendment does not apply to elections of members of the House of Representatives, which latter is governed exclusively by Sec. 4 of Art. I.

Appellant's argument that in some sections of the country nomination is tantamount to election, completely overlooks the fact that the Constitution and laws of the United States do not reach or protect the operations of the affairs of a party primary. That argument is identical with the one made in *Grovey v. Townsend*, 295 U. S. 45, the last of the series of celebrated Texas cases just mentioned, and this court disposed of that contention in this language:

> "The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the Primary election of July 9, 1934, and that in Texas *nomination by the Democratic Party, is equivalent to election.* These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that as a negro may not be denied a 'ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether.' So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimina-

tion by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution." (Italics supplied.)

CONCLUSION.

Of particular interest as background on this subject matter, are the cases of *U. S. v. Gradwell* and *U. S. v. Bathgate,*[37] in which are outlined the constitutional and legal history of federal laws relating to elections. Those cases announce the principle that criminal statutes must be strictly construed; that it is the policy of Congress to leave the conduct of elections to States; and that this policy should not be defeated by stretching old statutes to new uses to which they are not adapted, and for which they were not intended.

We respectfully submit that the judgment of the District Court should be affirmed.

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants
and Appellees.

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[37] U. S. v. Gradwell, 243 U. S. 476; U. S. v. Bathgate, 246 U. S. 218.

Thus, in *State ex rel. Nordin v. Erickson,* 119 Minn. 152, 156, in passing upon the constitutionality of a primary law the Court said:

> "In considering this question we must keep in mind that our primary election, which is purely of statutory origin, is the selection, by qualified voters, of candidates for the respective offices to be filled, while an election, which has its original in the Constitution, is the selection, by such voters, of officers to discharge the duties of the respective offices."

The Supreme Court of Missouri, in referring to the use of the word "election" in the Constitution of that State, said:

> "That the framers of the Constitution referred to the election of individuals to public office and not to mere nomination to office when they inserted Section 3 of Article 8 in the Constitution, we have no doubt whatever. As said by the St. Louis Court of Appeals in Dooley v. Jackson, 104 Mo. App. 1. c. 30, 'The word "election" frequently occurs in the Constitution of the State. First in Section 9, Article 2, and Article 8 of that instrument is wholly devoted to the subject of elections. But wherever used in the Constitution, it is used in the sense of choosing a person or persons for office by vote, and nowhere in the sense of nominating a candidate for office by a political party.'" (The State ex rel. Von Stade v. Taylor, 220 Mo. 618, 631.)

In *State ex rel. Zent v. Nichols,* 50 Wash. 508, 522, it was said:

> "It is contended that this section adds a requirement to the qualifications of electors in addition to

the constitutional requirements, and for that reason renders the entire act void. Were the primary election so far such an essential part of the general election as to make the constitutional provision relating to the qualification of electors entitled to vote at the general election applicable thereto, then there would be force in this objection; but we do not think the sections of the Constitution providing the qualifications of electors applicable to the primary election provided for by this statute. It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. Being so, the qualifications of electors provided by the Constitution for the general election can have no application thereto."

In *Ledgerwood v. Pitts*, 122 Tenn. 570, in passing upon the constitutionality of the primary election law of Tennessee, the Supreme Court of that State said (p. 587):

"The first inquiry, therefore, presented for our examination is whether or not these provisions of the Constitution have any application at all to primary elections. Admittedly no such thing could have been in contemplation by the framers of the constitution when they came to formulate the election and suffrage clauses of that instrument, for at that time no such thing as a primary election had ever been suggested. The object of this modern invention of political parties is primarily for the purpose of permitting and requiring the entire electorate of that party to participate in the nomination of candidates for political office. The plan is simply a substitution for the caucus or convention. It is true, as stated, it is a part of the political machinery that starts the candidate on his way and the political party is thereby enabled to crystallize and concentrate its vote on

that particular candidate who is chosen as the representative and expositor possibly of their political views, but the limitations and safeguards of the constitution apply exclusively to the final election when the officer is chosen in the mode required by the constitution."

In *State v. Woodruff*, 68 New Jersey Law, 89, 94, the Court said:

"But the election at which the fraud is committed, to constitute the common law offense, must be a popular election, the fraud going to the destruction of the right of the elective franchise in the selection of public officers for public positions. Such a thing as a primary was not known at the common law. It is the outgrowth of modern convenience or necessity. A primary is not an election in the sense of the common law; it is merely a method for the selection of persons to be balloted for at such an election."

In construing the Act of 1839 in relation to the laying of wagers on the event of "any election", the Supreme Court of Pennsylvania said:

"Instead of an election by all the electors of a municipality for public officers, it (the primary election) is an election by the members of a party for its candidates. These candidates may afterwards be voted for by some of the electors when all electors are entitled to vote. Men may be candidates who were not voted for, or who were defeated, at the primary election. An election by a party for its candidates widely differs in its object from an election by the electors for officers. Such primary election is as plainly without the purview of the Act of 1839 as is the election of officers for a private corporation." Commonwealth v. Wells, 110 Pa. 463, 468.

In *People v. Cavanaugh*, 112 Cal. 674, 676, 677, in construing the "Purity of Elections Act", the Court said:

> "The word 'election', as here used in subdivision 3, and the other subdivisions of section 19, does not refer to primary elections. The purity of elections law is entitled: 'An act to promote the purity of elections is regulating the conduct thereof, and to support the privilege of free suffrage by prohibiting certain acts and practices in relation thereto and providing for the punishment thereof'. In the body of this act may be found the word 'election' a hundred times or more, and it may be said in every instance that it is plainly apparent that the word is not used as applying to primary elections."

See, also,

State v. Simmons, 117 Ark. 159.
George v. State, 18 Ga. App. 753.
Riter v. Douglass, 32 Nev. 400, 433.
Gray v. Seitz, 162 Ind. 1.
Kelsow v. Cook, 184 Ind. 173.
Montgomery v. Chelf, 118 Ky. 766.
Hodge v. Bryan, 149 Ky. 110.
Hager v. Robinson, 154 Ky. 489.
Wilson v. Dean, 177 Ky. 97.
Len v. Montgomery, 31 N. D. 1.
Babbitt v. State, 174 Pac. (Wyoming) 188.

There is some conflict in the State cases with respect to the question whether the term "any election" can be deemed to include what has been called a "primary election". But, where the term "election" is held to include a so-called primary election, it is plainly because of the manner which the latter expression has been used in the

terminology of the State legislation. And the weight of authority is that even where the State statute has used the expression "primary election", a reference merely to an "election" is not sufficient to bring primary elections within the provision.

But when the State constitution or statute refers to an "election" in the sense of an election of public officers, it is not construed to include a so-called primary election, which is not an election of public officers but merely a selection of candidates.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 618

THE UNITED STATES OF AMERICA,

Appellant,

versus

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

SUPPLEMENTAL BRIEF OF DEFENDANTS AND APPELLEES IN REPLY TO BRIEF OF APPELLANT.

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants
and Appellees.

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CONGRESS DERIVES POWER TO REGULATE ELECTIONS FROM SEC. 4 OF ART. I, NOT SEC. 2 OF ART. I OF CONSTITUTION OF THE UNITED STATES.

Throughout appellant's brief, mention is made of Sec. 2 of Art. I of the Constitution, as the source of the power of Congress to enact Sections 19 and 20 of the Criminal Code.

Undoubtedly Congress obtains its power to legislate in connection with Congressional elections from Section 4 of Article I. This was originally held by this Court in *Ex parte Yarbrough*[1] and when the question was next raised[2] the *Yarbrough* case was cited with approval. Thereafter all of the cases on this subject are based on the assumption that the source of Congressional power to regulate Congressional elections is derived from Section 4 of Article I, and not on Section 2 of Article I.

It is clear that the choosing of the members of the House of Representatives has reference to the manner of making that choice, as stated in Article I, Section 4 which refers to holding elections. It is likewise clear that the "electors" spoken of in Section 2 of Article I, are the persons who vote at the "elections", spoken of in Section 4 of Article I.

Apparently appellant seems to rely as little as possible on Section 4 of Article I, thus avoiding the argument that will be raised as to the meaning of the word "elections", as used in that section, and as understood at the time of the adoption of the Constitution. Appellant seeks to make a distinction between the word "election", as stated in that Section, as against the word "chosen", as spoken of in Section 2, but it is clear that whatever power Congress has to pass laws concerning Congressional elections

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[1] Ex parte Yarbrough, 110 U. S. 651, the Court said, "So also, has the Congress been slow to exercise the powers expressly conferred upon it in relation to elections by the 4th Sec. of the 1st Art. of the Constitution.

"It was not until 1842 that Congress took any action under the powers here conferred," etc.

U. S. v. Gradwell, 243 U. S. 476, the Court said, "The power of Congress to deal with the election of Senators and Representatives is derived from Sec. 4 of Art. 1 of the Constitution of the United States.

[2] U. S. v. Mosely, 230 U. S. 385.

is derived from Section 4 of Article I, not from Section 2 of Article I. We have discussed in our original brief the history of this enactment, showing that it was a limited power given Congress and not a general one.

There is no clearly defined authority for assuming that Congress has a general power of legislation concerning federal elections. The power to regulate the election of senators and representatives comes wholly and entirely from Article I, Section 4 of the United States Constitution.[3]

In the *Yarbrough* case, in which the specific question was the right of Congress to punish criminally a conspiracy to intimidate a citizen in the exercise of his right to vote under #5508 R. S., the court reviews the regulatory statutes previously enacted by Congress for the control of elections and definitely grounds them upon the express authority of Art. I, Sec. 4.

When the 17th Amendment, providing for the popular election of senators, was first reported on January 11, 1911 by Senator Borah of the Senate Judiciary Committee, it contained a clause providing that it should be in lieu of Sec. 4 of Art. I insofar as it related to any authority in Congress to make or alter regulations as to the time or manner of holding elections for senators. But this clause was omitted and all reference to Sec. 4 of Art. I was eliminated from the resolution. "As finally submitted and adopted the amendment," says the Supreme Court in

[3] Ex parte Siebold, 100 U. S. 271; Ex parte Clark, 100 U. S. 399; Ex parte Yarbrough, 110 U. S. 651.

Newberry v. U. S.,[4] "does not undertake to modify Article I, Sec. 4, the source of congressional power to regulate the times, places and manner of holding elections." That section remains intact and applicable to the election of senators and representatives.[5]

There is another provision of the Constitution which may be here noted, namely Article I, Sec. 5, which makes each house the judge of election of its members which could be considered along with Article I, Sec. 2, para. 1 which says that the House of Representatives shall be composed of members chosen by the people of the several states. These clauses cannot be construed to give either House of Congress any additional affirmative authority to control or regulate the elections in the state. Congress, having been empowered to make regulations only as to the times, places and manner of holding elections for senators and representatives, cannot go beyond these limitations. This conclusion reasonably follows, otherwise it would have been meaningless for the Supreme Court to have so seriously weighed the limits and scopes of Section 4 of Article I, if by the mere application of Sections 5 and 2 it could have held that Congress possessed an additional indefinite, perhaps, limitless authority. It cannot be that the framers of the Constitution, after pointedly fixing the federal authority over elections in Article I, Section 4 intended to give by indirection a blanket authority under Sections 5 and 2. The words of

[4] Newberry v. U. S., 256 U. S. 232: "We find no support in reason or authority for the argument that because the officers where created by the Constitution, Congress has some indefinite, undefined power over elections for senators and representatives not derived from Section 4, Art. I."

[5] Congressional Record, Vol. 46, Page 846.

these latter sections do not lend themselves reasonably to such interpretations and in no opinion has the Supreme Court suggested such a conclusion.[6]

Insofar as Article I, Section 2 is concerned, the word "chosen", used there, is defined in Article I, Section 4, which infers that the method of choosing shall be by election.

DEFENDANTS WERE NOT OFFICERS OR EMPLOYEES OF STATE.

Appellant's brief is based entirely on the premise that commissioners of election, under Louisiana Act 46 of 1940, are state officers. This premise is assumed. The only real argument made to justify this assumption is that the method of their selection is prescribed by statute, and their compensation is provided by the local units of the state government. Appellant also cites the old case[7] which contains a statement that the primary is part of the election machinery of the State.

It is argued that because the State has regulated the activities of the political party and the primary, and has provided for a fair method of selecting the political party's officers and employees, that such officers and employees thereby become state officers. We do not believe that such contention is sound in reason or authority. This is particularly true where the State leaves the entire ad-

[6] See 6 Geo. L. J. 314, 322 (1928).
[7] State v. Michel, 121 La. 374.

ministration of the functions of the nominating primary to the political party and its officers and employees.[8]

Appellant has quoted elaborately from Louisiana Act 46 of 1940 but has overlooked the most important section having a bearing on the issues involved here, which is Section 10.[9]

There is nothing in Louisiana's Act which would justify the conclusion that the defendants here were merely acting as the agent of the State, as was the case in *Nixon v. Condon*, 286 U. S. 73. The commissioners here were merely performing administrative duties on behalf of a political party.

IS PRIMARY SUCH PART OF ELECTION MACHINERY OF STATE THAT WOULD CONSTITUTE COMMISSIONERS OFFICERS OR EMPLOYEES OF STATE? MICHEL CASE DISCUSSED.

The *Michel* case, relied upon by appellant, was decided in 1908 during the early history of the operation of the primary law in this State. It was an attack upon many features of the Act, as it existed at that time.

One of the points raised was that the State had no right to appropriate any of its funds to defray the expenses of

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[8] For further argument on this point see Appellee's Or. Br., p. 22.

[9] Section 10. "The members of the State Central Committee, shall be elected at the first primary election held in the State in January, 1944, for the nomination of State and parish officers, and every four years thereafter. They shall serve without compensation, shall be elected for a period of four years, and shall serve until their successors are elected. They shall never be considered as officers or employees of the State of Louisiana, or any of its subdivisions." (Emphasis supplied.)

the primary, but the Court in holding that it did have such a right, merely stated that the money appropriated was for a public purpose, as the primary was a part of the election machinery of the State. We understand that to mean that under the primary system the political party would have the right to have the name of the candidate nominated by it printed on the State ballot; that the State would recognize the party selected by the political party in printing its ballot; and to that limited extent it was part of the election machinery of the State. This is true in the Texas cases and all other cases which have come before this Court.[10] But, we do not understand that decision to abolish the general concept of the primary or the political party, for on Page 391 of that decision the Court definitely showed that it recognized the distinction which we are arguing here by using the following language:

> "It is of the very essence of a primary that none should have the right to participate in it but those who are in sympathy with the ideas of the political party by which it is being held. Otherwise the party holding the primary would be at the mercy of its enemies, who could participate for the sole purpose of its destruction, by capturing its machinery or foisting upon it obnoxious candidates or doctrines. It stands to reason that none but Democrats should have the right to participate in a Democratic primary and none but Republicans in a Republican primary. *A primary is nothing but a means of expressing party preference*, and it would cease to be that if by the admission of outsiders its result might be the very reverse of the party preference. If, therefore, there

[10] Grovey v. Townsend, 295 U. S. 45; Nixon v. Condon, 286 U. S. 73; Nixon v. Herndon, 273 U. S. 536.

could not be a primary under our Constitution without the admission of outsiders, the consequence would be that under our Constitution such a thing as a primary would be impossible. The argument, therefore, that in a statute-regulated, or compulsory, primary the qualifications of voters cannot be other than as fix d by the Constitution for the general election, would lead to the conclusion that such a primary was a legal impossibility." (Italics supplied.)

and again on Page 393, the Court said further:

"It is not true that it is by delegation from the Legislature that the state central committees hold the power of fixing the political qualifications of the voters at the primary. *They hold said power virtute officii, as being the governing bodies of the political parties. The Legislature has simply abstained from interference, leaving the power where it originally resided and naturally belongs.* And in so doing it has but obeyed the constitutional injunction to pass laws to secure the fairness of primaries. A primary wherein the governing body of the political body holding it could not determine the political qualification of those who are to have the right to participate in it would not only not be fair, but would be a legal monstrosity.

"In conclusion, and as a general commentary upon this statute, we will say that it has been adopted in the exercise of the police power of the state, and that the reader of it cannot but be impressed that its aim has not been to create conditions, or to confer rights or bestow benefits, or to take away rights, but simply to act upon and regulate existing conditions, with a view single to the public interest; that in nearly every state of the Union such a law has been adopted, and the assaults upon it have been repulsed everywhere,

> except in California alone; and that, finally, as expressed by Judge Parker (People v. Dem. Cen. Com., supra), the idea of such a law is 'to permit the voters to construct the organization from the bottom upwards, instead of from the top downwards,' and it would be strange indeed if the Constitution had made such a scheme impossible." (Italics supplied.)

If any other interpretation can be placed upon the holding in that case, we say that such is no longer the law of the State. The primary law, as well as the Constitution of the State has been changed many times since that case was decided. At present, Act 46 of 1940 clearly shows that the Legislature has recognized the independence of the political parties as being free from interference by any officer or employee of the State, and also specifically states that the members of the governing body should not be considered as officers or employees of the State or its subdivisions, and the courts, although not controlled, will always give great deference to the expressions of policy by the Legislature.

PERSON DEFEATED IN PRIMARY CAN BE ELECTED BY VOTERS IN GENERAL ELECTION.

Appellant argues that certain sections of the laws of Louisiana prevent a "write in" vote for a candidate defeated at a primary.[11]

This is incorrect. Appellant has fallen into this error because it relies on Act 160 of 1932, Sec. 1, which is no

[11] (Appellant's Br., pp. 19-22.)

longer in effect, but has been superseded by an amendment to the Constitution of the State found in Act 80 of 1934.

All of the Louisiana cases uniformly hold[12] that the voter cannot be deprived of his freedom of expressing his will at a general election by a restriction placed on the candidate by the Legislature, and that any prohibition against a candidate who was defeated at a primary, does not prevent his election at a general election, nor does it prevent the voter from voting for him at such election. The Constitution of the State protects the voters' rights in this respect.

It is argued that the later provision in Act 160 of 1932[13] was a method devised by the Legislature to prevent the voters from exercising their constitutional right to elect a defeated party candidate by writing his name in on the ballot at the general election.

That was not the reason for the enactment. It was passed to prevent a situation, such as recently occurred, wherein a candidate died the day before the general election, and a person attempted to claim the election by having a number of his friends write in his name at the last minute. It was to give interested parties notice that a contest was to be expected. It was also passed to avoid the necessity of a general election and the expense entailed when in fact the nominee of the party had no opposition.

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[12] Lacombe v. Laborde, 132 La. 435; Seal v. Knight, 10 La. Ap. 563; Payne v. Gentry, 149 La. 707.

[13] No longer in effect.

In Sec. 15 of Art. VIII, as amended by Act 80 of 1934,[13a] no provision is made in the fundamental law which would deprive the voters of electing a person who was defeated at a primary by writing in his name.

On the contrary, that enactment specifically guarantees to the voters the privilege of writing in the names of the candidates on the ballot, and the construction placed upon Sec. 87 of Act 46 of 1940 by the appellant as depriving the voters of this right would render that section of the act unconstitutional.

The aforesaid constitutional article, as amended, clearly so implies. It provides, at least by implication, that a candidate defeated in a primary can be voted for under the condition that he file a statement with the proper authority 10 days before the general election that he is willing and consents to be voted on for that office.

That is a constitutional amendment, voted upon by the people of the State, and there is nothing in it to justify the conclusion that the people have deprived themselves of the right they always enjoyed to vote for any person who was willing to be voted for, by writing his name on the ballot. If the framers of that constitutional amendment intended to deprive the voters of their long recognized right to vote for any candidate who desired their vote, that amendment would have so stated in clear and unmistakable language. If it had so provided, the people would no doubt have defeated it. Any restrictions found in the law is against the candidate, and not the voter,

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[13a] See Appendix, p. 28.

as there is no law in Louisiana which says that a defeated candidate at a primary cannot file a statement signifying his willingness for the voters to vote for him. Such a construction on that act would be in accordance with the policy of the Courts to allow complete freedom to the voters to select the candidate of their choice, and will so remain until the people decide to change the Constitution of the State of Louisiana.

The highest Court of Louisiana has spoken on that subject,[13b] and its finding is entitled to great weight in deciding the policy of the law of the State, as follows:

> "The inhibition placed upon the candidacy at the general election of one who has been defeated in a primary, however does not prevent the voter from voting for the candidate defeated in the primary. The law allows to the voter the right to vote for whom he chooses, and this right cannot be denied him merely because the one for whom he votes is prohibited from being an avowed or official candidate. The intent of the law is to allow the voters the greatest freedom in the expression of his will, and this freedom is not to be interfered with by the Court, in the absence of a clear and unambiguous expression by the lawmaking power of an intent to limit, or restrict within certain bounds, the exercise by the voter of this freedom of choice."

CAN PROVISIONS OF FOURTEENTH AMENDMENT BE INVOKED IN BRIEF WHERE IT FORMS NO PART OF RECORD?

For the first time in the proceedings in this case, appellant invokes the provisions of the 14th Amendment;

[13b] Lacombe v. Laborde, 132 La. 435.

and argues that voters in the primary election were denied the equal protection of the laws by state officers who refuse to count their votes as cast, and counted them in favor of an opposing candidate in violation of the equal protection clause of the 14th Amendment.

This point was never presented to nor passed upon, nor argued in the District Court, (see opinion R. 18-22); it was not specifically raised in the assignment of errors filed in this Court (R. 24); the statement of jurisdiction filed in this Court in compliance with Rule 12, as amended, relied exclusively on the incorrectness of the *Newberry* case.[14] No issue in connection with the 14th Amendment is stated in the jurisdictional statement. It therefore, appears that this question is not properly before this Court.

INDICTMENT FAILS TO CHARGE VIOLATION OF FOURTEENTH AMENDMENT.

Besides, as we read the indictment, it appears that Count 2 would be insufficient to charge defendants with depriving any citizen of the equal protection of the laws under the 14th Amendment. The indictment is drawn exclusively to cover such protection as would be afforded under Section 4 of Article I, of the Constitution. It charges that defendants wilfully subjected registered voters to the deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States, and then

[14] Newberry v. U. S., 256 U. S. 232.

it proceeds to particularize the rights, as follows: Their right to cast their vote for the candidate of their choice, and to have their votes counted for such candidates, as cast. That allegation could only cover such rights as the voters had under Section 4 of Article 1, giving Congress the right to regulate elections. Nowhere in the indictment is it charged by the Grand Jury that the defendants deprived any person of their rights to the equal protection of the laws.

DEFENDANTS ENTITLED TO BE INFORMED OF NATURE AND CAUSE OF ACCUSATION.

To permit the appellant to indict defendants for depriving voters of rights under the Constitution, to-wit: their right to cast their vote for the candidate of their choice and to have their votes counted for such candidates, as cast, (which would be a right which the courts have held is derived from Section 4 of Article I of the Constitution), and then for the first time to contend in an appellate court that such an indictment can be sustained on the theory that the deprivation was not what was alleged, but something different, that is to say, the deprivation of a right under the Constitution, to-wit, the equal protection of the law; would be to deprive these defendants of their rights under Amendment 6 to be informed of the nature and cause of the accusation.[15]

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[15] Amendment 6 of the Constitution provides:
"In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation."

Appellant anticipating this objection, and realizing its force answers it.[16]

In the first place the District Court did not err on this point at all for the point was not even mentioned in that Court.

In the second place, this Court has uniformly held that it is not sufficient to plead the offense in the language of the statute. The necessity is emphasized here when the language of the statute under which the offense is charged is so sweeping that it is capable of embracing innumerable rights, privileges, immunities and acts.

On this subject we believe we need only refer the Court to its holding in the celebrated *Cruikshank* case[17] which has been consistently followed as the law on this point, particularly to that part wherein this Court said,

> "These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, all and singular' the rights granted them by the Constitution, etc. The language is broad enough to cover all."
>
> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must

[16] Br., p. 30 thus:

"It is of no consequence that the indictment does not count in terms upon the 14th Amendment and at the right of the voters to equal protection of the laws. The charge is laid in the language of the statute and specifies as the right 'secured' and 'protected' by the Constitution the right of the voters whose ballots were altered to have their votes counted as cast. If, as we contend, the infringement of that right by the alleged acts of the defendants constitutes a denial of equal protection, it seems clear that the District Court erred in holding that the right is not 'secured' and 'protected' by the Constitution of the United States."

[17] U. S. v. Cruikshank, 92 U. S. 542, 557.

set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged:' and in U. S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of the offense whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition: but it must state the species: it must descend to particulars'."

SECTION 20 C. C. WAS ENACTED TO ENFORCE THE ELECTIVE FRANCHISE, AND NOT THE FOURTEENTH AMENDMENT AND DOES NOT EMBRACE RIGHTS PROTECTED BY FOURTEENTH AMENDMENT.

Appellant bases its argument on the statement that Section 20 of the Criminal Code was originally enacted to enforce the 14th Amendment. The genesis of that Section is set forth in the *Gradwell* case.[18]

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[18] U. S. v. Gradwell, 243 U. S. 476:

"* * * in 1870 * * * a comprehensive system for dealing with congressional elections was enacted. This system was comprised in Sec. 19-22 of the Act app. 5/31/79 (16 Stat. at L., p. 144, c. 114) in Sec. 5 and 6 of the Act app. 7/14/70 (16 Stat. at L., p. 254, c. 254) and in the act supplementing these acts, app. 6/10/72 (17 Stat. at L., pp. 347-349, c. 415.)"

"These laws provided extensive regulations for the conduct of congressional elections. * * *"

"These laws were carried into the revision of the United States statutes of 1873-74, under the title, 'Crimes Against the Elective Franchise and Civil Rights of Citizens, R. S. Sec. 5506 to 5532 inclusive.'

"It is a matter of general as of legal history that Congress, after 24 years of experience, returned to its former attitude toward such elections, and repealed all of these laws. * * * (Act app. 2/8/94 (29 Stat. at L. p. 36 c. 25) Comp. Stat. 1913, Sec. 1015). This repealing act left in effect as apparently relating to the elective franchise, only the provisions contained in the 8 sections of Chapter 3 of the Criminal Code Sections 19 to 26, inclusive, which have not been added to or substantially modified during the 23 years which have since eslapsed." (Emphasis supplied.)

It is therefore plain that Section 20 was not enacted for the purpose of enforcing the 14th Amendment, but was enacted to protect the elective franchise and particularly to enforce the 15th Amendment. Appellant contends that the point was settled *sub-silentio* in *Guinn v. U. S.*, 238 U. S. 347, 368; if it was so settled, it is not apposite as the case involved the 15th Amendment.

CRIMINAL STATUTES ARE STRICTLY CONSTRUED: INTENT OF CONGRESS IN PASSING SEC. 20 CRIMINAL CODE.

It is well settled that the only crimes against the United States are those which are statutory, and that statutes creating crimes do not extend to cases not covered by the words used. The Supreme Court of the United States has repeatedly laid down that doctrine.[19]

Congress never intended to include within the sweeping terms of the language of Section 20, the myriad of rights that are protected generally under the broad clauses of the 14th Amendment. To place the construction on

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[19] "There are no common law crimes against the United States."—U. S. v. Eaton, 144 U. S. 677.

"Regards must ALWAYS be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown PLAINLY AND UNMISTAKABLY constitute an offense within the meaning of an Act of Congress."—Bonnelley v. U. S., 276 U. S. 505; Fasulo v. U. S., 272 U. S. 620.

"Statutes creating crimes are to be STRICTLY construed in favor of the accused; they may not be held to extend to cases not covered by the words used."—U. S. v. Resnick, et als., 299 U. S. 207; U. S. v. Wiltberger, 5 Wheat. 76, 95.

"Before one may be punished, it must appear that his case is PLAINLY within the statute; there are no CONSTRUCTIVE offenses."—U. S. v. Lacher, 134 U. S. 624; U. S. v. Chase, 135 U. S. 255."

Sec. 20 contended for here would convert the Federal Court into a veritable police Court, for the activities falling within the scope of the 14th Amendment are so varied that it is not conceivable that Congress intended to include within the general terms of Section 20, all of the rights within the 14th Amendment.

On the contrary, it intended to make only such specific acts that contravened the provisions of the 14th Amendment a violation of the criminal laws of the United States that were specifically denounced in a congressional enactment, the other acts being relegated to the protection of the civil courts. This has been so since the time of the enactment of the 14th Amendment.

CONGRESS PASSES SPECIFIC ACTS TO PUNISH CERTAIN VIOLATIONS OF RIGHTS PROTECTED BY 14TH AMENDMENT.

Section 5 of the 14th Amendment provides that:

> "The Congress shall have power to enforce, by appropriate legislation the provisions of this Article."

Many instances could be cited to show that Congress did not believe that Section 20 applied to all of the rights protected by the 14th Amendment, for whenever it desired to punish acts violating the terms of the equal protection of the law clause, it passed special legislation denouncing the *particular activities* which deprived the person or class of persons of the equal protection of the laws.

There are many such laws.[20]

This Court recognized this fact in *Ex parte Comm. of Va.*, 100 U. S. 313, 317, and stated,

> "Congress, by virtue of the 5th Sec. of the 14th Amend. may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. *The mode of enforcement is left to its dicretion.*" (Italics supplied.)

An examination of the various Congressional enactments discussed in the Civil Rights Cases, *supra*, will disclose that in each instance Congress deemed it necessary to pass specific enactments denouncing these specific activities under the equal protection of the laws clause that it wished to make criminal, and to fix the penalty commensurate with the nature of the activity. Sec. 20 provides a penitentiary sentence, but only a fine is provided for the kind of activity under the statute passed upon in *Ex parte Va.*

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[20] Sec. 5519 read:

"If two or more persons in any State or Territory conspire to go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory, the equal protection of the laws, each of such persons shall be punished, etc."

See also the various enactments passed upon in the Civil Rights Cases, 109 U. S. 3.

See also the statute on which the prosecution in Ex parte Virginia was based, 100 U. S. 339, which sec. read:

"That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall on conviction thereof, be deemed guilty of a misdemeanor."

supra. This would not have been necessary if Section 20 had the sweeping effect contended for here. It is true that those laws were declared unconstitutional, as being directed at the individual rather than the State, still Congress enacted them under the power that they deemed they had under the 14th Amendment.

5TH AND 6TH AMENDMENTS REQUIRE ASCERTAINABLE STANDARD TO BE FIXED BY CONGRESS, RATHER THAN COURTS AND JURIES.

Under the familiar principle of law that criminal statutes must be so specific that any person reading them would be able to tell whether or not a particular activity would violate a criminal law, it could not be possible that Congress intended that Section 20 should be applied to the thousands of matters and things both grave and minor, embraced within the sweeping terms of the 14th Amendment. Any such construction as contended for here would render Sec. 20 unconstitutional as being too indefinite,[21] and this Court will not give such a construction to a statute as to render it unconstitutional when another reasonable construction can be placed thereon.

To state a *reductio ad absurdum* let us take the very case cited by appellant, for example, the *Iowa-Des Moines*

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[21] Congress, in attempting as it did in the Lever Act of 8/10/17, Sec. 4 (40 Stat. 276) as renacted in the act of 10/22/19, 2 c. 80 (41 Stat. 297) to punish criminally any person who wilfully made 'Any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", violated the 5th and 6th Amendments, which require an ascertainable standard of guilt, fixed by Congress, rather than by Courts and juries, and secure to accused persons the right to be informed of the nature and cause of accusations against them. U. S. v. L. Cohen Gro. Co., 255 U. S. 81.

Bank v. Bennett case, 284 U. S. 239, where the tax collector discriminated against a foreign corporation in favor of a domestic corporation in collecting taxes. If the discrimination had been a few dollars, those tax collectors would have to go to jail for if appellant's argument holds true here, then it should equally apply to that case.

Sec. 20 would likewise apply to such discriminations by State employees as resulted from the following activities to mention but a few; regulating railroad rates, all relations of employer and employee, all regulations relating to pursuit of occupations such as the practice of professions, etc., all cases arising under condemnation proceedings, all of the various cases whereby the state discriminates in classifications such as taxation, all would be covered by Section 20, and in general, in all matters where the state or its officers or employees exercise the police power of the state in a manner which may be found ultimately to deprive citizens of the equal protection of the law in petty matters as well as in matters of great importance, and the innumerable matters that would arise under that heading, such as zoning regulations, blue-sky regulations, regulations of bill-boards, regulating sales of various merchandise, etc.

It is clear that whenever Congress intended any of such matters to be cognizable under the federal criminal laws, it has passed a definitive statute setting forth the particular activity under the due process of law clause which it intends to make criminal, pursuant to the authority it has under Section 5 of the 14th Amendment.

CASES CITED BY APPELLANT DISCUSSED.

The cases cited by appellant (Br. p. 37) do not set forth any contrary doctrine than that argued here. The cases are all civil cases, with the exception of *Ex parte Virginia* and that case was based on a statute specifically denouncing the act which deprived negroes of the equal protection of the laws when State Officers discriminated against them, and the case illustrates our point.

We do not contend, as was the case in *Ex parte Va.*, that Congress lacks power to pass criminal statutes to enforce the equal protection of the law clause. We say that Congress has not done so, and did not so intend when it passed Sec. 20.

It will be noted that in all of the cases relied upon by appellant [22] there is a direct and intimate connection with the acts resulting in the discriminating against the citizen and the state government, not a fictitious or theoretical one, but a real and systematic connection with the act of the official and the state.

In the *Iowa-Des Moines Nat. Bk.* case, the state insisted on retaining the discriminatory tax, and was sustained by the highest Court in the State; in the *Missouri ex rel. Gaines* case, the curators in refusing the negro admission to the State-operated law school were sustained by the highest Court of the State; in the *Mosher* case and the *C. B. & Q. R. R.* case private property was illegally taken for a subdivision of the state.

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[22] Iowa-Des Moines Bk. vs. Bennett, 284 U. S. 239; Missouri Ex rel Gaines v. Canada, 305 U. S. 337; Mosher v. City of Phoenix, 287 U. S. 29; C. B. & Q. R. R. v. City of Chicago, 166 U. S. 226.

But in this case there is no connection between the state and the election commissioners, even if the court did find them theoretically to be state officers, any more than if they had been charged with stealing the voters' money instead of their ballots because the connection of the actions of the state and the commissioners is too remote, for as was said by this court in *Grovey v. Townsend*, 295 U. S. 45:

> "The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. *With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution.*" (Italics supplied.)

14TH AMENDMENT EMBRACES ALL CIVIL RIGHTS THAT MEN HAVE: THOSE THAT CONGRESS DESIRED TO PUNISH CRIMINALLY WOULD HAVE TO BE SET FORTH IN CODE OF LAWS.

When the 5th Sec. of the 14th Amendment was proposed in Congress, a clause was offered reading thus:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens

> of each state all the privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property."

That, of course, was not adopted, but if it had been, Congress would have then had the power to adopt affirmative legislation, and to make a code of regulations such as it has power to make original laws touching commerce. That code of laws could have extended to the original power embracing all of the rights of the citizen covering immunities, privileges, life, liberty, property and equality.[23]

Here appellants in effect contend that Congress intended Sec. 20 C. C. to accomplish objects and purposes that could only be accomplished by a code of laws covering all of the civil rights of man.

Congress can only, by proper legislation, render harmless hostile legislation or actions of states, or perhaps punish the agents of the State for enumerated and defined acts, which acts would have to be so enumerated and defined because the 14th Amendment covers all of the civil rights that men have.

Where Congress has not merely prohibitory power, but affirmative, original power given up to it by the states, such as to regulate commerce, coin money, carry mail, lay tariff, it is different; it is vested with power of general legislation on those subjects;[24] and it is to one of the rights which Congress has affirmative, original power to enact

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[23] See, Bannon, "The Fourteenth Amendment," pp. 459, 461.
[24] Bannon, "The Fourteenth Amendment, p. 462.

general laws, as contradistinguished from the 14th Amendment, which covers prohibitory power, that Sec. 20 appears to apply.

In passing on the nature of the legislation that Congress can provide under the 14th Amendment, this Court has said:[25]

> *"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property,* defining them and providing for their vindication. *That would be to establish a code of municipal law regulative of all private rights between man and man in society.* It would be to make Congress take the place of state legislatures, and supersede them. It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore enact due process of law in every case; and that because denial by a state to any person of the equal protection of the law is prohibited, therefore Congress may establish laws for their equal protection. *In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation,* this is, such as may be necessary for counteracting such laws as states may adopt, and which, by the amendment, they are prohibited from making, or *such acts or proceedings as the state may commit or take, and which, by the amendment, they are prohibited from committing or taking."* (Italics supplied.)

[25] The Civil Rights Cases, 109 U. S. 3.

When the court said "such acts" it undoubtedly contemplated that Congress would define "such acts" as it intended to punish criminally.

It seems clear from the language of that case that Sec. 20 could have no application to the rights protected by the 14th Amendment for Sec. 20 is all inclusive in scope, and would run counter to just what this Court said could not be done, i. e., "such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property." That section is general legislation, and it is said in the aforesaid opinion, "the legislation which Congress is authorized to adopt in this behalf is not general legislation."

Of course, Congress may under the amendment, provide legislation in advance to meet the exigency when it arises, but when it does so it should specify and define the acts of the states and its agents which are to be criminal cases, all in the manner set forth in the opinion in The Civil Rights cases aforesaid.

CONCLUSION.

With respect to the other points involved in this case, we submit the matter upon what is said in our principal brief.

We respectfully submit that the judgment of the District Court should be affirmed.

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants
and Appellees.

APPENDIX.

I.

Commissioners Selected Pursuant to Act 46 of 1940, Sec. 61.

Appellant errs when it states in note 2, p. 56 of its brief that the selection of commsisioners at the election involved in this case must have been under sections 2675 and 2678 of La. Gen. Stat. Ann. (Dart, 1939).

Those sections have been entirely superseded by Act 46 of 1940. Although a change in the personnel of the old Parish Committee does not take place until January, 1944, Sec. 19 of Act 46 of 1940 recognizes and continues the old committee in office until the January, 1944 election, but the committee is governed by Act 46 of 1940, and the commissioners of election involved in this case were selected pursuant to Act 46 of 1940, there being no warrant for the assumption that the provisions of Act 46 of 1940 are not operative until January, 1944.

II.

Commissioners Not Paid By State Treasury.

Appellant is incorrect in stating (B. p. 57) that the commissioners receive from the state treasury three dollars for each day's active service, citing Section 2675.

That section has been superseded by Secs. 35 and 61 of Act 46 of 1940, which provides that the municipality shall pay the commissioners. The payment does not come from the State Treasury.

III.

Art. 8, Sec. 15 of Constitution as Amended by Act 80 of 1934.

"The Legislature shall provide some plan by which the voters may prepare their ballots in secrecy at the polls. This section shall not be construed so as to prevent the names of independent candidates from being printed on the ballots with a device; *and names of candidates may be written on the ballot.* These provisions shall not apply to elections for the imposition of special taxes, for which the Legislature shall provide special laws.

"Provided that no person whose name is not authorized to be printed on the official ballot, *as the nominee of a political party* or as an independent candidate, shall be considered a candidate for any office unless he shall have filed with the Clerks of the District Court of the Parish or parishes in which such election is to be held, or the Clerk of the Civil District Court of the Parish of Orleans if he be a resident of the Parish of Orleans, at least ten (10) days before the general election, a statement containing the correct name under which he is to be voted for and containing the further statement that he is willing and consents to be voted for for that office, and provided further that no commissioners of election shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner." (Italics supplied.)

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SUPREME COURT OF THE UNITED STATES.

No. 618.—October Term, 1940.

The United States of America, Appellant, *vs.* Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Feddermann.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[May 26, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

Two counts of an indictment found in a federal district court charged that appellees, Commissioners of Elections, conducting a primary election under Louisiana law, to nominate a candidate of the Democratic Party for representative in Congress, willfully altered and falsely counted and certified the ballots of voters cast in the primary election. The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right "secured by the Constitution" within the meaning of §§ 19 and 20 of the Criminal Code, and whether the acts of appellees charged in the indictment violate those sections.

On September 25, 1940, appellees were indicted in the District Court for Eastern Louisiana for violations of §§ 19 and 20 of the Criminal Code, 18 U. S. C. §§ 51, 52. The first count of the indictment alleged that a primary election was held on September 10, 1940, for the purpose of nominating a candidate of the Democratic Party for the office of Representative in Congress for the Second Congressional District of Louisiana, to be chosen at an election to be held on November 10th; that in that district nomination as a candidate of the Democratic Party is and always has been equivalent to an election; that appellees were Commissioners of Election, selected in accordance with the Louisiana law to conduct the primary in the Second Precinct of the Tenth Ward

of New Orleans, in which there were five hundred and thirty-seven citizens and qualified voters.

The charge, based on these allegations, was that the appellees conspired with each other and with others unknown, to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast. The overt acts alleged were that the appellees altered eighty-three ballots cast for one candidate and fourteen cast for another, marking and counting them as votes for a third candidate, and that they falsely certified the number of votes cast for the respective candidates to the chairman of the Second Congressional District Committee.

The second count, repeating the allegations of fact already detailed, charged that the appellees, as Commissioners of Election willfully and under color of law subjected registered voters at the primary who were inhabitants of Louisiana to the deprivation of rights, privileges and immunities secured and protected by the Constitution and Laws of the United States, namely their right to cast their votes for the candidates of their choice and to have their votes counted as cast. It further charged that this deprivation was effected by the willful failure and refusal of defendants to count the votes as cast, by their alteration of the ballots, and by their false certification of the number of votes cast for the respective candidates in the manner already indicated.

The District Court sustained a demurrer to counts 1 and 2 on the ground that §§ 19 and 20 of the Criminal Code under which the indictment was drawn do not apply to the state of facts disclosed by the indictment and that, if applied to those facts, §§ 19 and 20 are without constitutional sanction, citing *United States* v. *Gradwell*, 243 U. S. 476, 488, 489; *Newberry* v. *United States*, 256 U. S. 232. The case comes here on direct appeal from the District Court under the provisions of the Criminal Appeals Act, Judicial Code, § 238, 18 U. S. C. § 682; 28 U. S. C. § 345, which authorize an appeal by the United States from a decision or judgment sustaining a demurrer to an indictment where the decision or judgment is

"based upon the invalidity or construction of the statute upon which the indictment is founded".

Upon such an appeal our review is confined to the questions of statutory construction and validity decided by the District Court. *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Birdsell*, 233 U. S. 223, 230; *United States* v. *Borden Co.*, 308 U. S. 188, 192-193. Hence, we do not pass upon various arguments advanced by appellees as to the sufficiency and construction of the indictment.

Section 19 of the Criminal Code condemns as a criminal offense any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States". Section 20 makes it a penal offense for anyone who, "acting under color of any law" "willfully subjects or causes to be subjected any inhabitant of any state . . . to the deprivation of any rights, privileges and immunities secured and protected by the Constitution and laws of the United States". The Government argues that the right of a qualified voter in a Louisiana congressional primary election to have his vote counted as cast is a right secured by Article I, §§ 2 and 4 of the Constitution, and that a conspiracy to deprive the citizen of that right is a violation of § 19, and also that the willful action of appellees as state officials, in falsely counting the ballots at the primary election and in falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment, all in violation of § 20 of the Criminal Code.

Article I, § 2 of the Constitution, commands that "The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature". By § 4 of the same article "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators". Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2 and to the authority

conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.

We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining, first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellee's alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of § 19 and to deprive inhabitants of the state of that right within the meaning of § 20, and finally, whether §§ 19 and 20 respectively are in other respects applicable to the alleged acts of appellees.

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, §§ 1 and 3.

The primary is conducted by the state at public expense. Act No. 46, *supra*, § 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot.[1] The Secretary of

[1] The ballots are printed at public expense, § 35 of Act No. 46, Regular Session, 1940, are furnished by the Secretary of State, § 36 in a form prescribed by statute, § 37. Close supervision of the delivery of the ballots to

State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act. Act 46, § 1.

One whose name does not appear on the primary ballot, if otherwise eligible to become a candidate at the general election, may do so in either of two ways, by filing nomination papers with the requisite number of signatures or by having his name "written in" on the ballot on the final election. Louisiana Act No. 224, Regular Session 1940, §§ 50, 73. Section 87 of Act No. 46 provides "No one who participates in the primary election of any political party shall have the right to participate in a primary election of any other political party with the view of nominating opposing candidates, nor shall he be permitted to sign any nomination for any opposing candidate or candidates, nor shall he be permitted to be himself a candidate in opposition to anyone nominated at or through a primary election in which he took part".

Section 15 of Article VIII of the Constitution of Louisiana as amended by Act 80 of 1934, provides that "No person whose name is not authorized to be printed on the official ballot as nominee of a political party or an independent candidate shall be considered a candidate unless he shall file in the appropriate office at least ten days before the general election a statement containing the correct name under which he is to be voted for and containing the further statement that he is willing and consents to be voted for for that office. The article also provides that "no commissioner of election shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner". Applying these provisions the Louisiana Court of Appeals for the Parish of Orleans has held in *Serpas* v. *Trebucq*, decided April 7, 1941, rehearing denied with opinion April 21, 1941, that an unsuccessful candidate at the primary may not offer himself as a candidate at a general election, and that votes for him

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the election commissioners is prescribed, §§ 43-46. The polling places are required to be equipped to secure secrecy, §§ 48-50; §§ 54-57. The selection of election commissioners is prescribed, § 61 and their duties detailed. The commissioners must swear to conduct the election impartially, § 64 and are subject to punishment for deliberately falsifying the returns or destroying the lists and ballots, §§ 98, 99. They must identify by certificate the ballot boxes used, § 67, keep a triplicate list of voters, § 68, publicly canvass the return, § 74 and certify the same to the Secretary of State, § 75.

may not lawfully be written into the ballot or counted at such an election.

The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas* v. *Trebucq, supra,* voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.[2]

Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election proceedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of

[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives (1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267-269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosley*, 238 U. S. 383. And see *Hague* v. *C. I. O.*, 307 U. S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase "rights" "secured by the Constitution" appearing in § 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see, *Minor* v. *Happersett*, 21 Wall. 162, 170; *United States* v. *Reese*, 92 U. S. 214, 217-218; *McPherson* v. *Blacker*, 146 U. S. 1, 38-39; *Breedlove* v. *Suttles*, 302 U. S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers". See *Ex parte Siebold*, 100 U. S. 37; *Ex parte Yarbrough*, *supra*, 663, 664; *Swafford* v. *Templeton*, 185 U. S. 487; *Wiley* v. *Sinkler*, 179 U. S. 58, 64.

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough*, *supra*; *Wiley* v. *Sinkler*, *supra*; *Swafford* v. *Templeton*, *supra*; *United States* v. *Mosley*, *supra*; see *Ex parte Siebold*, *supra*; *In re Coy*, 127 U. S. 731; *Logan* v. *United States*, 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough*, *supra*; *Logan* v. *United States*, *supra*.

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, § 2. We may assume that the framers of the Constitution

in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. *Davidson* v. *New Orleans*, 96 U. S. 97; *Brown* v. *Walker*, 161 U. S. 591, 595; *Robertson* v. *Baldwin*, 165 U. S. 275, 281, 282. If we remember that "it is a Constitution we are expounding", we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our Constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose or its words as any the less guarantying the integrity of that choice when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Nor can we say that that choice which the Constitution protects is restricted to the second step because § 4 of Article I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by § 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress. The point

whether the power conferred by § 4 includes in any circumstances the power to regulate primary elections was reserved in *United States* v. *Gradwell, supra,* 487. In *Newberry* v. *United States, supra,* four Justices of this Court were of opinion that the term "elections" in § 4 of Article I did not embrace a primary election since that procedure was unknown to the framers. A fifth Justice who with them pronounced the judgment of the Court, was of opinion that a primary law enacted before the adoption of the Seventeenth Amendment, for the nomination of candidates for Senator, was not an election within the meaning of § 4 of Article I of the Constitution, presumably because the choice of the primary imposed no legal restrictions on the election of Senators by the state legislatures to which their election had been committed by Article I, § 3. The remaining four Justices were of the opinion that a primary election for the choice of candidates for Senator or Representative were elections subject to regulation by Congress within the meaning of § 4 of Article I. The question then has not been prejudged by any decision of this Court.

To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes. As we have said, a dominant purpose of § 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives by the designated electors, that is to say, by some form of election. Cf. the Seventeenth Amendment as to popular "election" of Senators. From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates.

Long before the adoption of the Constitution the form and mode of that expression had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had guaranteed. The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election whether for

the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry* v. *United States, supra*, 263-269, 285, 287.

Unless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries.[3] Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom and integrity of the choice. Words,

[3] Congress has recognized the effect of primaries on the free exercise of the right to choose the representatives, for it has inquired into frauds at primaries as well as at the general elections in judging the "Elections Returns and Qualificaions of its Own Members", Art. I, § 5. See Grace v. Whaley, H. Rept. No. 158, 63d Cong., 2d Sess.; Peddy v. Mayfield, S. Rept. No. 973, 68th Cong., 2d Sess.; Wilson v. Vare, S. Rept. No 1858, 70th Cong., 2d Sess., S. Rept. No. 47, 71st Cong., 2d Sess., and S. Res. 111, 71st Cong., 2d Sess.

See also Investigation of Campaign Expenditures in the 1940 Campaign, S. Rept. No. 47, 77th Cong., 1st Sess., p. 48 *et seq.*

especially those of a constitution, are not to be read with such stultifying narrowness. The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.

Not only does § 4 of Article I authorize Congress to regulate the manner of holding elections, but by Article I, § 8, Clause 18, Congress is given authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or any department or officer thereof." This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional". *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. That principle has been consistently adhered to and liberally applied, and extends to the congressional power by appropriate legislation to safeguard the right of choice by the people of representatives in Congress secured by § 2 of Article I. *Ex parte Yarbrough*, *supra*, 657, 658; cf. *Second Employers Liability Cases*, 233 U. S. 1, 49; *Houston & Texas Ry. Co.* v. *United States*, 234 U. S. 342, 350, 355; *Wilson* v. *New, et al.*, 243 U. S. 332, 346, 347; *First National Bank* v. *Union Trust Company*, 244 U. S. 416, 419; *Selective Draft Cases*, 245 U. S. 366, 381; *United States* v. *Ferger, et al.*, 250 U. S. 199, 205; *Hamilton* v. *Kentucky Distillers Co.*, 251 U. S. 146, 155, 163; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *United States* v. *Darby*, No. 82, decided February 3, 1941, and cases cited.

There remains the question whether §§ 19 and 20 are an exercise of the congressional authority applicable to the acts with which appellees are charged in the indictment. Section 19 makes it a crime to conspire to "injure" or "oppress" any citizen "in the

free exercise of any right or privilege secured to him by the Constitution".[4] In *Ex parte Yarbrough, supra,* and in *United States* v. *Mosley, supra,* as we have seen, it was held that the right to vote in a congressional election is a right secured by the Constitution, and that a conspiracy to prevent the citizen from voting or to prevent the official count of his ballot when cast, is a conspiracy to injure and oppress the citizen in the free exercise of a right secured by the Constitution within the meaning of § 19. In reaching this conclusion the Court found no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen "in the free exercise of any right or privilege secured to him by the Constitution", and concerned itself with the question whether the right to participate in choosing a representative is so secured.[5] Such is our function here. Conspiracy to prevent the official count of a citizen's ballot, held in *United States* v. *Mosley, supra,* to be a violation of § 19 in the case of a congressional election, is equally a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election prerequisite to the choice of party candidates for a congressional election. In both cases the right infringed is one secured by the Constitution. The injury suffered by the citizen in the exercise of the right is an injury which the statute describes and to which it applies in the one case as in the other.

The suggestion that § 19, concededly applicable to conspiracies to deprive electors of their votes at congressional elections, is not sufficiently specific to be deemed applicable to primary elections, will hardly bear examination. Section 19 speaks neither of elec-

[4] Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51):

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." (R. S. § 5508; Mar. 4, 1909, c. 321, § 19, 35 Stat. 1092.)

[5] In United States *v.* Mosley, 238 U. S. 383, 386, the Court thought that "Manifestly the words are broad enough to cover the case", it canvassed at length the objections that § 19 was never intended to apply to crimes against the franchise, and the other contention, which it also rejected, that § 19 had been repealed or so restricted as not to apply to offenses of that class. It is unnecessary to repeat that discussion here.

tions nor of primaries. In unambiguous language it protects "any right or privilege secured by the Constitution", a phrase which as we have seen extends to the right of the voter to have his vote counted in both the general election and in the primary election, where the latter is a part of the election machinery, as well as to numerous other constitutional rights which are wholly unrelated to the choice of a representative in Congress. *United States* v. *Waddell*, 112 U. S. 76; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458; *Guinn* v. *United States*, 238 U. S. 347.

In the face of the broad language of the statute, we are pointed to no principle of statutory construction and to no significant legislative history which could be thought to sanction our saying that the statute applies any the less to primaries than to elections, where in one as in the other it is the same constitutional right which is infringed. It does not avail to attempt to distinguish the protection afforded by § 1 of the Civil Rights Act of 1871,[6] to the right to participate in primary as well as general elections, secured to all citizens by the Constitution, see *Guinn* v. *United States*, 238 U. S. 347; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268, on the ground that in those cases the injured citizens were Negroes whose rights were clearly protected by the Fourteenth Amendment. At least since *Ex parte Yarbrough*, *supra*, and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, §§ 2 and 4 of the Constitution.[7] Differences of opinion have arisen as to the effect of the primary in particular cases on the choice of representatives. But we are troubled by no such doubt here. Hence, the right to participate through the primary in the choice of representatives in Congress—a right clearly secured by

[6] Section 1 reads: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] See e. g. Guinn v. United States, 238 U. S. 347; United States v. O'Toole, 236 Fed. 993, aff'd United States v. Gradwell, 243 U. S. 476; Acsel v. United States, 232 Fed. 652; Felix v. United States, 186 Fed. 685; Karem v. United States, 121 Fed. 250; Walker v. United States, 93 F. (2d) 383; Luteran v. United States, 93 F. (2d) 395.

the Constitution—is within the words and purpose of § 19 in the same manner and to the same extent as the right to vote at the general election. *United States* v. *Mosley, supra.* It is no extension of the criminal statute, as it was not of the civil statute in *Nixon* v. *Herndon, supra,* to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression.

It is hardly the performance of the judicial function to construe a statute, which in terms protects a right secured by the Constitution, here the right to choose a representative in Congress, as applying to an election whose only function is to ratify a choice already made at the primary but as having no application to the primary which is the only effective means of choice. To withdraw from the scope of the statute, an effective interference with the constitutional right of choice, because other wholly different situations not now before us may not be found to involve such an interference, cf. *United States* v. *Bathgate,* 246 U. S. 220; *United States* v. *Gradwell,* 243 U. S. 476, is to say that acts plainly within the statute should be deemed to be without it because other hypothetical cases may later be found not to infringe the constitutional right with which alone the statute is concerned.

If a right secured by the Constitution may be infringed by the corrupt failure to include the vote at a primary in the official count, it is not significant that the primary, like the voting machine, was unknown when § 19 was adopted.[8] Abuse of either may infringe the right and therefore violate § 19. See *United States* v. *Pleva,* 66 F. (2d) 529, 530; cf. *Browder* v. *United States,* 312 U. S. —. Nor does the fact that in circumstances not here present there may be difficulty in determining whether the primary so affects the right of the choice as to bring it within the constitutional protection, afford any ground for doubting the construction and application of the statute once the constitutional question

[8] No conclusion is to be drawn from the failure of the Hatch Act, 53 Stat. 1147, 18 U. S. C. § 61, to enlarge § 19 by provisions specifically applicable to primaries. Its failure to deal with the subject seems to be attributable to constitutional doubts, stimulated by Newberry v. United States, 256 U. S. 232, which are here resolved. See 84 Cong. Rec., 76th Cong., 1st Sess., p. 4191; cf. Investigation of Campaign Expenditures in the 1940 Campaign, S. Rept. No. 47, 77th Cong., 1st Sess., p. 48.

is resolved. That difficulty is inherent in the judicial administration of every federal criminal statute, for none, whatever its terms, can be applied beyond the reach of the congressional power which the Constitution confers. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Hoke* v. *United States*, 227 U. S. 308; *Nash* v. *United States*, 229 U. S. 373; *United States* v. *Freeman*, 239 U. S. 117; *United States* v. *F. W. Darby*, No. 82, decided February 3, 1941.

The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this § 20 also gives protection.[9] The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law. *Ex parte Virginia*, 100 U. S. 339, 346; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 287, *et seq.*; *Hague* v. *C. I. O.*, 307 U. S. 496, 507, 519; cf. 101 F. (2d) 774, 790. Here the acts of appellees infringed the constitutional right and deprived the voters of the benefit of it within the meaning of § 20, unless by its terms its application is restricted to deprivations "on account of an inhabitant being an alien or by reason of his color or race".

The last clause of § 20 protects inhabitants of a state from being subjected to different punishments, pains or penalties by reason of alienage, color or race, than are prescribed for the punishment of citizens. That the qualification with respect to alienage, color and race, refers only to differences in punishment and not to deprivations of any rights or privileges secured by the Constitution, is evidenced by the structure of the section and the necessities of the practical application of its provisions. The qualification as to alienage, color and race, is a parenthetical phrase in the clause

[9] Section 20 of the Criminal Code (U. S. C., Title 18, Sec. 52):

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. § 5510; Mar. 4, 1909, c. 321, § 20, 35 Stat. 1092.)

penalizing different punishments "than are prescribed for citizens" and in the common use of language could refer only to the subject matter of the clause and not to that of the earlier one relating to the deprivation of rights to which it makes no reference in terms.

Moreover the prohibited differences of punishment on account of alienage, color or race, are those referable to prescribed punishments which are to be compared with those prescribed for citizens. A standard is thus set up applicable to differences in prescribed punishments on account of alienage, color or race, which it would be difficult if not impossible to apply to the willful deprivations of constitutional rights or privileges, in order to determine whether they are on account of alienage, color or race. We think that § 20 authorizes the punishment of two different offenses. The one is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his color or race, than are prescribed for the punishment of citizens. The meager legislative history of the section supports this conclusion.[10]

So interpreted § 20 applies to deprivation of the constitutional rights of qualified voters to choose representatives in Congress. The generality of the section made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like.

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[10] The precursor of § 20 was § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, which reads:

"That any person who, under color of any law, statute, ordinance, regulation, or custom shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction shall be punished by fine. . . ."

This section, so far as now material, was in substance the same as § 20 except that the qualifying reference to differences in punishment made no mention of alienage, the reference being to "different punishment on account of such person having at any time been held in a condition of slavery or involuntary servitude".

Senator Trumbull, the putative author of S. 61, 39th Cong., 1st Sess., the Civil Rights Bill of 1866, and Chairman of the Senate Judiciary Committee which reported the bill, in explaining it stated that the bill was "to protect

We do not discuss the application of § 20 to deprivations of the right to equal protection of the laws guaranteed by the Fourteenth Amendment, a point apparently raised and discussed for the first time in the Government's brief in this Court. The point was not specially considered or decided by the court below, and has not been assigned as error by the Government. Since the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates, we are not called upon to construe the indictment in order to raise a question of statutory validity or construction which we are alone authorized to review upon this appeal.

Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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all persons in the United States in their civil rights and furnishes the means of their vindication. . . ." Cong. Globe, 39th Cong., 1st Sess., p. 211. He also declared, "The bill applies to white men as well as black men". Cong. Globe, 39th Cong., 1st Sess., p. 599. Opponents of the bill agreed with this construction of the first clause of the section, declaring that it referred to the deprivation of constitutional rights of all inhabitants of the states of every race and color. Pp. 598, 601.

On February 24, 1870, Senator Stewart of Nevada, introduced S. 365, 41st Cong., 2d Sess., § 2 of which read:

"That any person who under color of any law, statute, ordinance, regulation or custom shall subject, or cause to be subjected any inhabitant or any State or Territory to the deprivation of any rights secured or protected by this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor. . . ."

In explaining the bill he declared, Cong. Globe, 41st Cong., 2d Sess., p. 1536, that the purpose of the bill was to extend its benefits to aliens, saying, "It extends the operation of the Civil Rights Bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States." The Committee reported out a substitute bill to H. R. 1293, to which S. 365 was added as an amendment. As so amended the bill when adopted became the present § 20 of the Criminal Code which read exactly as did § 2 of the Civil Rights Act, except that the word "aliens" was added and the word "citizens" was substituted for the phrase "white persons".

While the legislative history indicates that the immediate occasion for the adoption of § 20, like the Fourteenth Amendment itself, was the more adequate protection of the colored race and their civil rights, it shows that neither was restricted to that purpose and that the first clause of § 20 was intended to protect the constitutional rights of all inhabitants of the states. H. R. 1293, 41st Cong., 2d Sess., which was later amended in the Senate to include § 2 of S. 365 as § 17 of the bill as it passed, now § 20 of the Criminal Code, was originally entitled "A bill to enforce the right of citizens of the United States to vote in the several states of this Union who have hitherto been denied that right on account of race, color or previous condition of servitude". When the bill came to the Senate its title was amended and adopted to read, "A bill to enforce the right of citizens of the United States to vote in the several states of this Union and for other purposes."

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SUPREME COURT OF THE UNITED STATES.

No. 618.—October Term, 1940.

The United States of America, Appellant, *vs.* Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[May 26, 1941.]

Mr. Justice Douglas, dissenting.

Free and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity. As stated by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 651, 666, "the temptations to control these elections by violence and corruption" have been a constant source of danger in the history of all republics. The acts here charged, if proven, are of a kind which carries that threat and are highly offensive. Since they corrupt the process of Congressional elections, they transcend mere local concern and extend a contaminating influence into the national domain.

I think Congress has ample power to deal with them. That is to say I disagree with *Newberry* v. *United States*, 256 U. S. 232, to the extent that it holds that Congress has no power to control primary elections. Art. I, § 2 of the Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Art I, § 4 provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." And Art. I, § 8, clause 18 gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Those sections are an

arsenal of power ample to protect Congressional elections from any and all forms of pollution. The fact that a particular form of pollution has only an indirect effect on the final election is immaterial. The fact that it occurs in a primary election or nominating convention is likewise irrelevant. The important consideration is that the Constitution should be interpreted broadly so as to give to the representatives of a free people abundant power to deal with all the exigencies of the electoral process. It means that the Constitution should be read so as to give Congress an expansive implied power to place beyond the pale acts which, in their direct or indirect effect, impair the integrity of Congressional elections. For when corruption enters, the election is no longer free, the choice of the people is affected. To hold that Congress is powerless to control these primaries would indeed be a narrow construction of the Constitution inconsistent with the view that that instrument of government was designed not only for contemporary needs but for the vicissitudes of time.

So I agree with most of the views expressed in the opinion of the Court. And it is with diffidence that I dissent from the result there reached.

The disagreement centers on the meaning of § 19 of the Criminal Code which protects every right secured by the Constitution. The right to vote at a final Congressional election and the right to have one's vote counted in such an election have been held to be protected by § 19. *Ex parte Yarbrough, supra; United States* v. *Mosley*, 238 U. S. 383. Yet I do not think that the principles of those cases should be, or properly can be, extended to primary elections. To sustain this indictment we must so extend them. But when we do, we enter perilous territory.

We enter perilous territory because, as stated in *United States* v. *Gradwell*, 243 U. S. 476, 485, there is no common law offense against the United States; "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson*, 7 Cranch 32, 34. If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. 76, 105, "probability is not a guide which a court, in construing a penal statute, can safely take." It is one

thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." *United States* v. *Lacher*, 134 U. S. 624, 628. That admonition is reemphasized here by the fact that § 19 imposes not only a fine of $5,000 and ten years in prison but also makes him who is convicted "ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive. Cf. *James* v. *Bowman*, 190 U. S. 127. Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.

Sec. 19 does not purport to be an exercise by Congress of its power to regulate primaries. It merely penalizes conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States". Thus, it does no more than refer us to the Constitution[1] for the purpose of determining whether or not the right to vote in a primary is there secured. Hence we must do more than find in the Constitution the power of Congress to afford that protection. We must find that protection on the face of the Constitution itself. That is to say, we must in view of the wording of § 19 read the relevant provisions of the Constitution for the purposes of this case through the window of a criminal statute.

There can be put to one side cases where state election officials deprive negro citizens of their right to vote at a general election (*Guinn* v. *United States*, 238 U. S. 347), or at a primary. *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73. Discrimination on the basis of race or color is plainly outlawed by the Fourteenth Amendment. Since the constitutional mandate is plain, there is no reason why § 19 or § 20 should not be applicable. But the situation here is quite different. When we turn to the

[1] While § 19 also refers to "laws of the United States", § 19 and § 20 are the only statutes directly in point.

constitutional provisions relevant to this case we find no such unambiguous mandate.

Art. I, § 4 specifies the machinery whereby the times, places and manner of holding elections shall be established and controlled. Art. I, § 2 provides that representatives shall be "chosen" by the people. But for purposes of the criminal law as contrasted to the interpretation of the Constitution as the source of the implied power of Congress, I do not think that those provisions in absence of specific legislation by Congress protect the primary election or the nominating convention. While they protect the right to vote and the right to have one's vote counted at the final election as held in the *Yarbrough* and *Mosley* cases, they certainly do not *per se* extend to all acts which in their indirect or incidental effect restrain, restrict, or interfere with that choice. Bribery of voters at a general election certainly is an interference with that freedom of choice. It is a corruptive influence which for its impact on the election process is as intimate and direct as the acts charged in this indictment. And Congress has ample power to deal with it. But this Court in *United States* v. *Bathgate*, 246 U. S. 220, by a unanimous vote, held that conspiracies to bribe voters at a general election were not covered by § 19. While the conclusion in that case may be reconciled with the results in the *Yarbrough* and *Mosley* cases on the ground that the right to vote at a general election is personal while the bribery of voters only indirectly affects that personal right, that distinction is not of aid here. For the failure to count votes cast at a primary has by the same token only an indirect effect on the voting at the general election. In terms of causal effect tampering with the primary vote may be as important on the outcome of the general election as bribery of voters at the general election itself. Certainly from the viewpoint of the individual voter there is as much a dilution of his vote in the one case as in the other. So, in light of the *Mosley* and *Bathgate* cases, the test under § 19 is not whether the acts in question constitute an interference with the effective choice of the voters. It is whether the voters are deprived of their votes in the general election. Such a test comports with the standards for construction of a criminal law, since it restricts § 19 to protection of the rights plainly and directly guaranteed by the Constitution. Any other test entails an inquiry into the indirect or incidental effect on the general election of the acts done. But in view of the generality of the

words employed such a test would be incompatible with the criteria appropriate for a criminal case.

The *Mosley* case, in my view, went to the verge when it held that § 19 and the relevant constitutional provisions made it a crime to fail to count votes cast at a general election. That Congress intended § 19 to have that effect was none too clear. The dissenting opinion of Mr. Justice Lamar in that case points out that § 19 was originally part of the Enforcement Act of May 31, 1870, c. 114, § 6; 16 Stat. 140. Under another section of that act (§ 4), which was repealed by the Act of February 8, 1894 (28 Stat. 36) the crime charged in the *Mosley* case would have been punishable by a fine of not less than $500 and imprisonment for 12 months.[2] Under § 19 it carried, as it still does, a penalty of $5000 and ten years in prison. The Committee Report (H. Rep. No. 18, 53d Cong., 1st Sess.) which recommended the repeal of other sections clearly indicated an intent to remove the hand of the Federal Government from such elections and to restore their conduct and policing to the states. As the Report stated (p. 7): "Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union." In view of this broad, comprehensive program of repeal it is not easy to conclude that the general language of § 19 which was not repealed not only continued in effect much which had been re-

[2] Sec. 5506, Rev. Stat.: "Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election . . . shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment." Sec. 5511 provided: "If, at any election for Representative or Delegate in Congress, any person . . . knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote . . . he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both . . . ."

pealed but also upped the penalties for certain offenses which had been explicitly covered by one of the repealed sections. Mr. Justice Holmes, writing for the majority in the *Mosley* case, found in the legislative and historical setting of § 19 and in its revised form a Congressional interpretation which, if § 19 were taken at its face value, was thought to afford voters in final Congressional elections general protection. And that view is a tenable one since § 19 originally was part of an Act regulating general elections and since the acts charged had a direct rather than an indirect effect on the right to vote at a general election.

But as stated by a unanimous court in *United States* v. *Gradwell, supra,* p. 486, the *Mosley* case "falls far short" of making § 19 "applicable to the conduct of a state nominating primary". Indeed, Mr. Justice Holmes, the author of the *Mosley* opinion, joined with Mr. Justice McReynolds in the *Newberry* case in his view that Congress had no authority under Art. I, § 4 of the Constitution to legislate on primaries. When § 19 was part of the Act of May 31, 1870, it certainly would never have been contended that it embraced primaries, for they were hardly known at that time.[3] It is true that "even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States,* 312 U. S. 335, 340. Yet the attempt to bring under § 19 offenses "committed in the conduct of primary elections or nominating caucuses or conventions" was rejected in the *Gradwell* case, where this Court said that in absence of legislation by Congress on the subject of primaries it is not for the courts "to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. . . . the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law." 243 U. S. pp. 488-489. The fact that primaries were hardly known when § 19 was enacted, the fact that it was part of a legislative program governing general elections not primary elections, the fact that it has been in nowise implemented by legislation directed at primaries give credence to the unanimous view in the *Gradwell* case that § 19 has not by the mere passage of time taken

[3] Merriam & Overacker, Primary Elections (1928) chs. I-III, V; Sait, American Parties & Elections (1927) ch. X; Brooks, Political Parties & Electoral Problems (1933) ch. X.

on a new and broadened meaning. At least it seems plain that the difficulties of applying the historical reason adduced by Mr. Justice Holmes in the *Mosley* case to bring general elections within § 19 are so great in case of primaries that we have left the safety zone of interpretation of criminal statutes when we sustain this indictment. It is one thing to say, as in the *Mosley* case, that Congress was legislating as respects general elections when it passed § 19. That was the fact. It is quite another thing to say that Congress by leaving § 19 unmolested for some seventy years has legislated unwittingly on primaries. Sec. 19 was never part of an act of Congress directed towards primaries. That was not its original frame of reference. Therefore, unlike the *Mosley* case, it cannot be said here that § 19 still covers primaries because it was once an integral part of primary legislation.

Furthermore, the fact that Congress has legislated only sparingly and at infrequent intervals even on the subject of general elections (*United States* v. *Gradwell, supra*) should make us hesitate to conclude that by mere inaction Congress has taken the greater step, entered the field of primaries, and gone further than any announced legislative program has indicated. The acts here charged constitute crimes under the Louisiana statute. La. Act No. 46, Reg. Sess. 1940, § 89. In absence of specific Congressional action we should assume that Congress has left the control of primaries and nominating conventions to the states—an assumption plainly in line with the Committee Report, quoted above, recommending the repeal of portions of the Enforcement Act of May 31, 1870 so as to place the details of elections in state hands. There is no ground for inference in subsequent legislative history that Congress has departed from that policy by superimposing its own primary penal law on the primary penal laws of the states. Rather, Congress has been fairly consistent in recognizing state autonomy in the field of elections. To be sure, it has occasionally legislated on primaries.[4] But even when dealing specifically with the nominating process, it has never made acts of the kind here in question a crime. In this connection it should be noted that the bill which became the Hatch Act (53 Stat. 1147; 18 U. S. C. § 61) contained a section which made it unlawful "for any person to intimidate, threaten, or coerce, or to attempt to intim-

[4] Act of June 25, 1910, c. 392, 36 Stat. 822, as amended by the Act of August 19, 1911, c. 33, 37 Stat. 25; Act of October 16, 1918, c. 187, 40 Stat. 1013.

idate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for or not to vote for any candidate for the nomination of any party as its candidate" for various federal offices including representatives "*at any primary or nominating convention* held solely or in part" for that purpose. This was stricken in the Senate. 84 Cong. Rec., pt. 4, 76th Cong., 1st Sess., p. 4191. That section would have extended the same protection to the primary and nominating convention as § 1 of the Hatch Act[5] extends to the general election. The Senate, however, refused to do so. Yet this Court now holds that § 19 has protected the primary vote all along and that it covers conspiracies to do the precise thing on which Congress refused to legislate in 1939. The hesitation on the part of Congress through the years to enter the primary field, its refusal to do so[6] in 1939, and the restricted scope of such primary laws as it has passed should be ample evidence that this Court is legislating when it takes the initiative in extending § 19 to primaries.

We should adhere to the strict construction given to § 19 by a unanimous court in *United States* v. *Bathgate, supra,* p. 226, where it was said: "Section 19, Criminal Code, of course, now has the same meaning as when first enacted . . . and considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters." That leads to the conclusion that § 19 and the relevant constitutional provisions should be read so as to exclude all acts which do not have the direct effect of depriving voters of their right to vote at general elections. That

[5] "That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions."

[6] Sec. 2 of the Hatch Act, however, does make unlawful certain acts of administrative employees even in connection with the nominations for certain federal offices. And see 54 Stat. 767, No. 753, ch. 640, 76th Cong., 3d Sess. As to the power of Congress over employees or officers of the government see United States v. Wurzbach, 280 U. S. 396.

view has received tacit recognition by Congress. For the history of legislation governing Federal elections shows that the occasional Acts of Congress[7] on the subject have been primarily directed towards supplying detailed regulations designed to protect the individual's constitutional right to vote against pollution and corruption. Those laws, the latest of which is § 1 of the Hatch Act, are ample recognition by Congress itself that specific legislation is necessary in order to protect the electoral process against the wide variety of acts which in their indirect or incidental effect interfere with the voter's freedom of choice and corrupt the electoral process. They are evidence that detailed regulations are essential in order to reach acts which do not directly interfere with the voting privilege. They are inconsistent with the notions in the opinion of the Court that the Constitution unaided by definite supplementary legislation protects the methods by which party candidates are nominated.

That § 19 lacks the requisite specificity necessary for inclusion of acts which interfere with the nomination of party candidates is reemphasized by the test here employed. The opinion of the Court stresses, as does the indictment, that the winner of the Democratic primary in Louisiana invariably carries the general election. It is also emphasized that a candidate defeated in the Louisiana primaries cannot be a candidate at the general election. Hence, it is argued that interference with the right to vote in such a primary is "as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance," and that the "primary in Louisiana is an integral part of the procedure for the popular choice" of representatives. By that means the *Gradwell* case is apparently distinguished. But I do not think it is a valid distinction for the purposes of this case.

One of the indictments in the *Gradwell* case charged that the defendants conspired to procure one thousand unqualified persons to vote in a West Virginia primary for the nomination of a United States Senator. This Court, by a unanimous vote, affirmed the judgment which sustained a demurrer to that indictment. The Court specifically reserved the question as to whether a "primary

[7] See for example, Act of May 31, 1870, 16 Stat. 140; Act of July 14, 1870, 16 Stat. 254, 255-256; Act of Feb. 28, 1871, 16 Stat. 433; Act of June 25, 1910, 36 Stat. 822; Act of August 19, 1911, 37 Stat. 25; Act of August 23, 1912, 37 Stat. 360; Act of October 16, 1918, 40 Stat. 1013; Federal Corrupt Practices Act, 1925, 43 Stat. 1070; Hatch Act, August 2, 1939, 53 Stat. 1147.

should be treated as an election within the meaning of the Constitution". But it went on to say that even assuming it were, certain "strikingly unusual features" of the particular primary precluded such a holding in that case. It noted that candidates of certain parties were excluded from the primary and that even candidates who were defeated at the primary could on certain conditions be nominated for the general election. It therefore concluded that whatever power Congress might have to control such primaries, it had not done so by § 19.

If the *Gradwell* case is to survive, as I think it should, we have therefore this rather curious situation. Primaries in states where the winner invariably carries the general election are protected by § 19 and the Constitution, even though such primaries are not by law an integral part of the election process. Primaries in states where the successful candidate never wins, seldom wins, or may not win in the general election are not so protected, unless perchance state law makes such primaries an integral part of the election process. Congress having a broad control over primaries might conceivably draw such distinctions in a penal code. But for us to draw them under § 19 is quite another matter. For we must go outside the statute, examine local law and local customs, and then on the basis of the legal or practical importance of a particular primary interpret the vague language of § 19 in the light of the significance of the acts done. The result is to make refined and nice distinctions which Congress certainly has not made, to create unevenness in the application of § 19 among the various states, and to make the existence of a crime depend, not on the plain meaning of words employed interpreted in light of the legislative history of the statute, but on the result of research into local law or local practices. Unless Congress has explicitly made a crime dependent on such facts, we should not undertake to do so. Such procedure does not comport with the strict standards essential for the interpretation of a criminal law. The necessity of resorting to such a circuitous route is sufficient evidence to me that we are performing a legislative function in finding here a definition of a crime which will sustain this indictment. A crime, no matter how offensive, should not be spelled out from such vague inferences.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.